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*Perspectives on the Canadian  
Economic Union*

*This is Volume 60 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.*

*The studies contained in this volume reflect the views of their authors and do not imply endorsement by the Chairman or Commissioners.*





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# Perspectives on the Canadian Economic Union

MARK KRASNICK

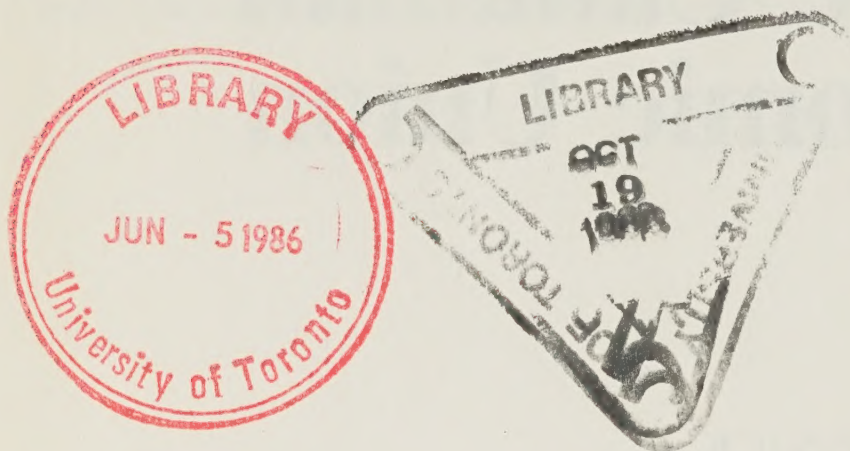
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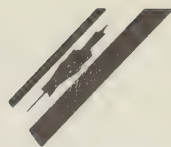


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When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD





At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

*Economics* research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER  
ALAN CAIRNS  
DAVID C. SMITH







How much of an economic union does a political federation encompass? Did the drafters of the Canadian Constitution address the need for ensuring that provinces did not set up barricades at their borders? Does it make sense to have a freer flow of goods between France and the Federal Republic of Germany than between British Columbia and Alberta? Is provincial self-sufficiency in tomato production an acceptable and appropriate goal for a local jurisdiction?

In looking at an economic union, many writers have followed the progression first formulated by Bela Balassa, who wrote that “from its lowest to highest forms, integration has been said to progress through the freeing of barriers to trade, the liberalization of factor movement, the harmonization of national economic policies and the total unification of these policies.” This volume of studies, the second in a series on federalism and the economic union in Canada, adopts that framework and examines the concept of an economic union in nations and between nations. How have other nations and groups of nations answered the questions that we have had asked of us?

In the study “The Concept of Economic Union in International and Constitutional Law,” the authors’ analyses are both legal and institutional. Ivan Bernier, Nicolas Roy, Charles Pentland and Daniel Soberman examine how economic unions are structured, then probe the strengths and weaknesses of various formulations. By looking at the United States and Australia as well as Canada, and at the use of economic unions in developing countries as well as in the more widely examined European Economic Community, the authors show how nation states assume the existence of economic integration and focus on political concerns, while treaty makers — who are usually attempting to

enhance local sovereignty — are very specific on the strengths and limits of the structures being created.

The three other studies in this volume use Canada as their focus. In the first paper, “Interprovincial Trade and the Welfare Effects of Marketing Boards,” Wayne R. Thirsk looks at the agricultural products industry, examining instances of trade integration and focussing on some initial figures of the costs of interprovincial barriers. Thirsk’s conclusion is that the costs are minor when compared with the international costs of such protectionism; but the desire for a reduction in governmentally induced distortions remains as well.

Returning to the Balassa framework, the study by Nola Silzer and Mark Krasnick, “The Free Flow of Goods in the Canadian Economic Union,” looks at the constitutional prohibitions to erecting barriers to trade within Canada. The authors first analyze the constitutional provisions and then turn to the practices in which government engages, and so the paradox that faces all policy makers begins to emerge. While it appears true that the use of barriers by governments has not had a large overall negative impact on internal Canadian trade, there is a disquiet that without some more thorough policing, this will not remain the case in the future.

In the final paper, “Mobility Rights, Personal Mobility and the Canadian Economic Union,” by Sanda Rodgers-Magnet and Joseph Eliot Magnet, we move up from trade concerns to the liberalization of factor flows. This paper, along with a companion study published as a separate volume (volume 66, *Mobility of Capital in the Canadian Economic Union*, by Nicolas Roy), moves into less familiar ground. The concern for both capital and labour mobility emerged as an issue in the 1970s, when a number of highly visible government actions led academics and then governments to express reservations about the effectiveness of Canadian law to protect the economic benefits that can be derived from the mobility of people and capital within the federation. As each initiative by government had both regional supporters and national detractors, and as the constitutional negotiations moved mobility onto the “rights” agenda, the need for some analysis of the underpinnings in the Canadian law led to the preparation of these papers. As such, these studies are meant to be useful as summaries of the current state of the law and as indicators of the way in which the debate may unfold.

This will not be the last examination of the effectiveness of the Canadian economic union. The new initiatives of the European Economic Community to strengthen their union and the movement toward debating free trade in a bilateral or multinational context will make us look once again at our imposition of distortions. If these papers help to provide a backdrop for that discussion, these volumes will, in our view, be a success.

MARK KRASNICK





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# Interprovincial Trade and the Welfare Effects of Marketing Boards

WAYNE R. THIRSK

## Introduction

Marketing boards represent an important element of institutional change in Canadian agriculture. Creatures of supportive federal and provincial legislation, many of these boards have relaxed the discipline of the marketplace and provided producers with a measure of control over their economic destiny. As with any revision in the rules of the game, there will be some winners and, unfortunately, some losers. The economist's role in analyzing institutional change is to identify the beneficiaries and victims of new economic circumstances and to determine the extent of their gains or losses. It is up to policy makers to decide whether these variations in income level are desirable or not.

Following in this tradition, this paper does not take a clear stand either in favour of or against marketing boards, but rather strives to enhance awareness of how their behaviour affects the efficiency of resource allocation in the Canadian economy. Although the goals of marketing boards, as set out in their enabling legislation — such as fair returns to producers, preservation of family farms, reduced instability of prices, and reasonable prices for consumers — can be invoked to evaluate their performance, it is more germane to judge them by their effects than by their intent. In their pursuit of regulating agricultural markets, marketing boards have effectively achieved domestic self-sufficiency in production. Restrictions on domestic output, coupled with curbs on imports, have resulted in the replacement of imports with domestic production at higher price levels. Moreover, in carving up the domestic market among the provinces, national marketing board agencies have unleashed some strong pressures for provincial self-sufficiency in agricultural production.

The main focus of this paper is an analysis of the means by which marketing boards influence the level and pattern of interprovincial trade and the significance of this influence on economic welfare. The scope of the study is restricted to the four major products — eggs, dairy products, broilers and turkeys — in which marketing boards have supply management capabilities, or obvious economic clout, and seek to control interprovincial trade flows. There are, of course, many other marketing boards operating in Canada, but they either do not possess the same degree of market power, or, as in the case of tobacco, they concern products grown in only one province.<sup>1</sup>

The paper is organized in five sections. The first section, Characteristics of Marketing Boards, provides a brief history and description of marketing board behaviour in the four products under consideration. The second section, Welfare Cost of Marketing Boards, introduces the basic concepts and concerns of this paper in the form of a diagrammatic model of welfare changes. This model provides the analytical framework needed to interpret the existing literature dealing with the welfare impact of marketing boards. Some of this literature is considered in the third section, Empirical Studies of the Cost of National and Provincial Self-Sufficiency. In the fourth section, Welfare Costs of Greater Provincial Self-Sufficiency, the diagrammatic model is put through its paces to obtain some numerical estimates, admittedly crude, of the changes in economic welfare associated with the interprovincial trade policies of the various marketing boards. Some evidence bearing on the ability of marketing boards to segment provincial markets is also presented. A final section draws together some of the conclusions of this study and discusses some of the policy implications which emerge from the analysis.

## **Characteristics of Marketing Boards**

In the 1920s and 1930s market forces and constitutional restrictions on provincial interference with interprovincial trade (section 121 of the BNA Act) combined to frustrate early efforts to create provincial marketing boards. Whenever a provincial board, such as the B.C. fruit growers in the 1920s, attempted to limit production and supplies in pursuit of higher prices, its actions were nullified by the increase in imports from other areas. Measures to curb these inward commodity flows, however, were deemed to be unconstitutional by the federal Supreme Court.

A way out of this impasse was provided by the federal Agricultural Products Marketing Act of 1949, which delegated authority to provincial boards to engage in interprovincial and international trade. Still, provinces found it difficult to constrain agricultural shipments effectively from other provinces, and an interprovincial trade war erupted in 1970 over the flow of chickens and eggs among Ontario, Manitoba and Quebec. In the Manitoba Egg Reference Case, the Supreme Court ruled in 1971 that



provincial boards could not restrict entry from other provinces. In response to this interprovincial struggle for market shares, the federal government passed the Federal Farm Products Marketing Agencies Act in 1972, whose preamble states that the behaviour of provincial marketing boards was to be coordinated so as “to promote a strong, efficient and competitive producing and marketing industry for the regulated product or products . . . and to have due regard to the interests of the producers and consumers of the regulated product or products.” The coordinating agent for each commodity was to be a national marketing agency that would negotiate an agreement among the provincial boards on the division of the national market. A federal agency, the National Farm Products Marketing Council (NFPMC), was handed the responsibility of monitoring, supervising and reviewing the policies of the various national marketing boards to ensure that their conduct complied with the new legislation.

To date the NFPMC has sanctioned the formation of three national marketing agencies — the Canadian Egg Marketing Agency (CEMA) in 1972, the Canadian Turkey Marketing Agency (CTMA) in 1974, and the Canadian Chicken Marketing Agency (CCMA) in 1978. Each agency is operated and controlled by producers of the relevant commodity. A similar supply management scheme operates for the marketing of industrial milk under the auspices of the Canadian Dairy Commission (CDC), a federal Crown corporation established in 1967.

Control over trade flows, a pricing formula, and a market sharing arrangement are the three essential instruments used by marketing boards to achieve their goals. Federal import quotas, administered by the Department of Industry, Trade and Commerce, effectively shelter domestic producers from foreign price influences. Under the General Agreement on Tariffs and Trade (GATT) arrangement, any country having a supply management program may restrict imports to the level of the average in the previous five-year period. In the case of eggs, turkeys and chickens, Canadian prices have risen sharply relative to U.S. price levels, eliminating earlier export capabilities in these commodities. Veeman (1982), for instance, notes that for the period 1960–69, prior to the creation of the CEMA, egg prices in Canada were on average 86 percent of U.S. prices compared to 110 percent for the post-CEMA era from 1973 to 1979. Similarly, Canadian broiler and turkey prices were 121 and 111 percent, respectively, of U.S. prices in the earlier period and 136 and 122 percent, respectively, of U.S. prices in the later period.

While most marketing boards have no control over interprovincial movement of processed products, they all but prohibit interprovincial movements by individual producers, typically by requiring that producers deliver to a provincial agency. As a result of disagreements over market shares, not all provinces are party to a national agreement. Nova Scotia, for example, has recently withdrawn from the CTMA because it



felt that its production quota was inadequate and, for the same reason, Alberta has never belonged to the CCMA. Alberta also withdrew briefly from the CTMA because producers felt their market share failed to keep pace with the province's rapid growth in population.

The existence of unregulated output from non-member provinces has complicated the task of regulating interprovincial trade, but has not made such regulation impossible. Unauthorized broiler exports from Alberta to other parts of Canada have elicited an orderly market regulation from the CCMA to forestall unlicensed shipments from that province. On the strength of that regulation the CCMA recently has been awarded an injunction against an Edmonton firm to cease and desist its exports to other provinces. Such regulations have been used infrequently in the past to curb a province from "dumping" its products in other province's markets. In the normal course of events licences are used simply to keep track of interprovincial movements. For fluid milk, which is subject only to provincial marketing board regulation, a complex set of administrative procedures prevents virtually all interprovincial movement.

An integral component of marketing board strategy is the adoption of a formula pricing scheme, which sets prices on the basis of average costs of production in the industry and with a view toward guaranteeing a "fair" rate of return to the producer. For eggs, CEMA sets the price of grade A large eggs for all of the participating provinces by establishing an Ontario price that reflects a national weighted average of production costs including an allowance for risk and a prescribed rate of return.<sup>2</sup> From this price, transport and handling costs to Manitoba are subtracted to establish a base point price for the other provinces (Nova Scotia is the base for Prince Edward Island and Newfoundland), which take as their producer price this price plus the cost of shipping and handling from the base point. A similar, centrally determined formula is used for broilers and turkeys except that in these instances it is used only as a guide, or handy reference point, and each province is responsible for setting its own price. In practice the price of turkey is tied to the Ontario producers' price because Ontario is the dominant producer and its output moves interprovincially. Through its offers to purchase butter, skim milk powder, and cheese at uniform prices across Canada, the CDC supports the prices paid to producers of industrial milk. In addition, direct subsidies are paid to producers to allow them to obtain an annual target return on industrial milk that is determined by a formula sensitive to changes in both consumer prices and the cost of inputs.

With the possible exception of broilers, prices have been determined that are sufficient to exclude any residual demand for imports. Having estimated the size of the domestic market at a point of self-sufficiency, each marketing board must prevent the appearance of unwanted surpluses and somehow divide the national market among the provinces.

The quota has been selected as the instrument to serve both purposes. Based on historical production levels, each province is assigned a market sharing quota in the dairy industry which is subdivided further among producers within a province, so that the sum of all quota allotments will balance domestic demand at the required price. Any producer exceeding his individual quota is subject to a large overquota penalty. No provision exists for interprovincial trade in milk quota.

Analogous techniques for limiting production and carving up the national market have been applied to the feather commodities. CEMA announces a national production quota related to the expected demand for table eggs. The provincial share of that national quota is based on a province's percentage contribution to total output during the five-year period 1967–71 prior to the creation of CEMA. Since initial quota allocations required a global cutback in national production, it is only in recent years that the national quota has exceeded 100 percent of the initial allocation and the problem of allocating or reallocating overbase quota has arisen. Unfortunately, the criteria for negotiating an enlarged market share are numerous and conflicting. They include an appeal to the principle of comparative advantage; growth in the size of the provincial market; failure to meet quota limits; the feasibility of increased production; and differential transportation costs to market areas from various production points. As Haack, Hughes, and Shapiro (1981) and others have pointed out, all but the first criterion favour provincial self-sufficiency. In the absence of any provision for the interprovincial trading of quota, the pressures leading toward provincial autarchy benefit importing provinces at the expense of exporting provinces. Both the CCMA and CTMA have procedures for determining a national quota and distributing market shares among provinces that are patterned after CEMA's practices.

Within each province the provincial boards often impose maximum size limitations on producers eligible to receive quota in order to preserve a family farm structure. They have also adopted a wide variety of approaches to the reallocation of quota within their jurisdiction. Aside from the size restriction just mentioned, some have made quota freely exchangeable among producers, and a market for quota has developed in response. The valuation of quota in this market is examined later in this paper. Other provinces have required that any unused quota be surrendered to the appropriate board, which then will reallocate it to other producers as it sees fit. Still other provinces have made quota non-transferable among production units, with the result that the value of quota tends to be imbedded in the value of farm assets, particularly land. Appendix Table 1-A1 outlines the diversity of provincial practice in this regard.

Most marketing boards have developed techniques for dealing with surplus production whenever there is a gap between anticipated demand



and actual output. In eggs, for example, surplus eggs are broken and diverted to the breaker market where prices for liquid, powder and frozen eggs are determined by unimpeded market forces. Although the price is lower in this market than in the market for table eggs, the producer is not aware of this difference since he receives the same price for eggs within quota at the registered receiving station. The revenue shortfall is made up from a fund administered by CEMA and the provincial boards which is financed by a levy imposed on producers for every dozen eggs sold. Thus the effective price received by producers is somewhat lower than the actual price set by the provincial boards. However, if supply is occasionally short, processors will sometimes pay premiums that are passed on to producers.

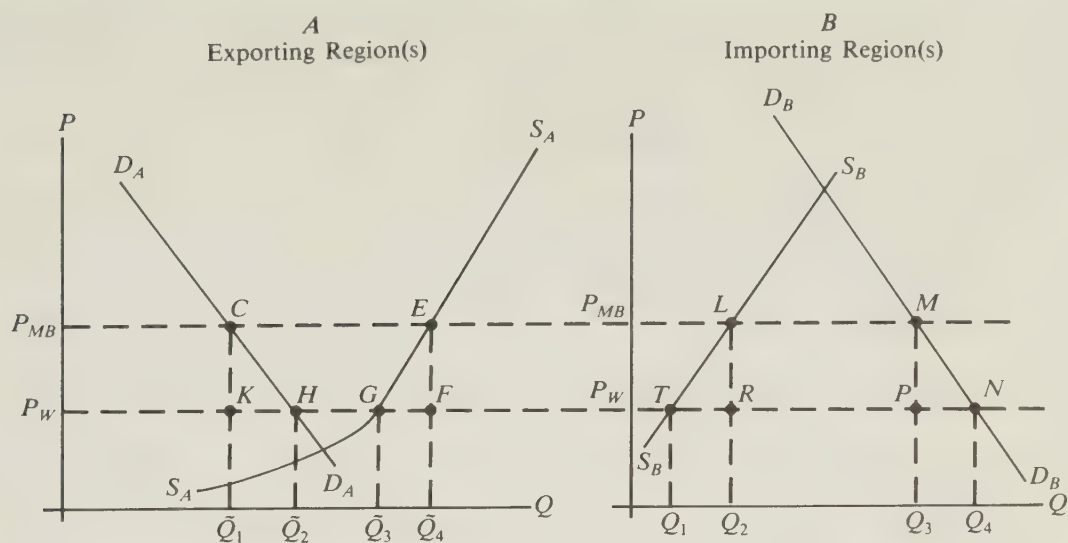
The principle of comparative advantage asserts that in an untrammelled market each region will specialize in the production of those items in which it has a relative cost advantage in comparison with other areas. Thus, even if a region were the lowest cost source for all commodities, it would still be most profitable for producers to specialize in those items in which its cost advantage was relatively greatest. If production were organized along these lines, the total cost of production would be minimized and resources would be efficiently allocated across regions in the sense that it would be impossible to lower total costs by altering the interregional pattern of production.

The market sharing arrangements just described are unlikely to generate this outcome. In the first place, the concept of comparative advantage is essentially dynamic, shifting over time as technological progress and cost curves change at different rates in different areas, and is not apt to be closely related to the historical market shares of each region.<sup>3</sup> Under the current marketing board arrangements, a province with greater than average population growth or growth in per capita consumption may either have to import from higher cost regions or surrender some exports to other regions. Conversely, a high cost province may be able to displace lower cost imports if its per capita consumption or population growth is less than average. In the second place, the tendency toward self-sufficiency in the allocation of overbase quota will gradually shift agricultural production from lower-cost exporting provinces to higher-cost import regions.

Both aspects of marketing board behaviour, the allocation of base and overbase quota, represent a fragmentation of the domestic market which runs counter to the principle of comparative advantage. This theme is amplified in subsequent sections of this paper. The purpose of this section has been to describe the main price and supply characteristics of dairy, egg and poultry marketing boards, so that they can be analyzed within the context of a fairly simple partial equilibrium model that appears below.



FIGURE 1-1 National Self-Sufficiency and Economic Welfare



Welfare Costs of Marketing Boards

The isolation of Canadian agriculture from external pricing pressures owing to the conduct of a marketing board is depicted in Figure 1-1. The Canadian market is disaggregated into exporting and importing regions, A and B, respectively. For the sake of simplifying the diagrams, transport costs between regions have been ignored. They could easily be incorporated into the analysis as an upward shift in the cost of purchasing imports, but they would add nothing to the analysis and are omitted for that reason.

Prior to the formation of the marketing board, the world price  $P_W$  prevails in both regions. The exporting region is shown to be selling the amount  $\tilde{Q}_2 - \tilde{Q}_3$  to the rest of the world, possibly to foreign markets if transport costs to different areas are considered, while the importing region is seen to be absorbing the amount  $Q_1 - Q_4$  from foreign sources of supply. With the creation of a marketing board, imports from other countries are curtailed and price rises to  $P_{MB}$ ; the exporting region abandons foreign markets altogether and supplies the domestic markets exclusively, with  $\tilde{Q}_1 - \tilde{Q}_4$  of its output satisfying the demands of consumers in the importing region. The important result here is that after the marketing board is established, trade flows are reoriented to an east-west direction within Canada from an earlier north-south orientation between Canada and the United States and, to a lesser extent, between Canada and other countries besides the United States. Seen in this context, marketing boards are the agricultural counterpart of Canada's National Tariff Policy and do for agriculture what that policy did for manufacturing.

Figure 1-1 is useful in sorting out the welfare changes that arise from the appearance of a marketing board. Two caveats, however, should be

borne in mind. First, the analysis assumes that sectors outside agriculture behave in a competitive fashion, for if they do not, the analysis must be extended to include non-competitive distortions elsewhere in the economy.<sup>4</sup> Second, there are strong interdependencies among different agricultural commodities, so that a change in one market will ordinarily start off a chain reaction of repercussions in other markets. Partial equilibrium analysis cannot adequately deal with such feedback effects, and the results presented here are best viewed as illustrative rather than definitive.

For our purposes, if price generally exceeds marginal cost in non-agricultural sectors, the area under supply curves for agricultural outputs can no longer be interpreted as the value of additional consumption in other parts of the economy when agriculture releases resources to them. Instead, the value of this extra consumption will be worth more than the value of the resources transferred from agriculture. Consequently, what we have labelled as the consumption cost of marketing boards in Figure 1-1 will be overstated in this case and may not even exist. However, what is referred to as the production cost of marketing boards will be unaffected by this consideration. Both problems are potentially capable of resolution if more complicated general equilibrium methods of analysis are adopted. It should also be noted that the situation portrayed in Figure 1-1 is more applicable to poultry and egg products than to dairy markets since fluid milk, for example, has never entered either international or interprovincial commerce in significant amounts.<sup>5</sup>

From the perspective of interregional welfare changes, the increase in price from  $P_W$  to  $P_{MB}$  improves the exporting regions' terms of trade at the expense of the importing regions and, as a result, there is a redistribution of income from consumers in the importing area to producers in the export regions. Consumers in both regions are made worse off, by the amount represented in the trapezoidal area  $P_{MB}CHP_W$  in region A and by  $P_{MB}MNP_W$  in region B. These welfare losses must be compared to producers' gains of  $P_{MB}EGP_W$  experienced in region A and  $P_{MB}LTP_W$  in region B. On balance, residents of region A are better off by the amount shown as the trapezoid  $CEGH$  while residents of region B are worse off in the amount shown as  $LMNT$ .

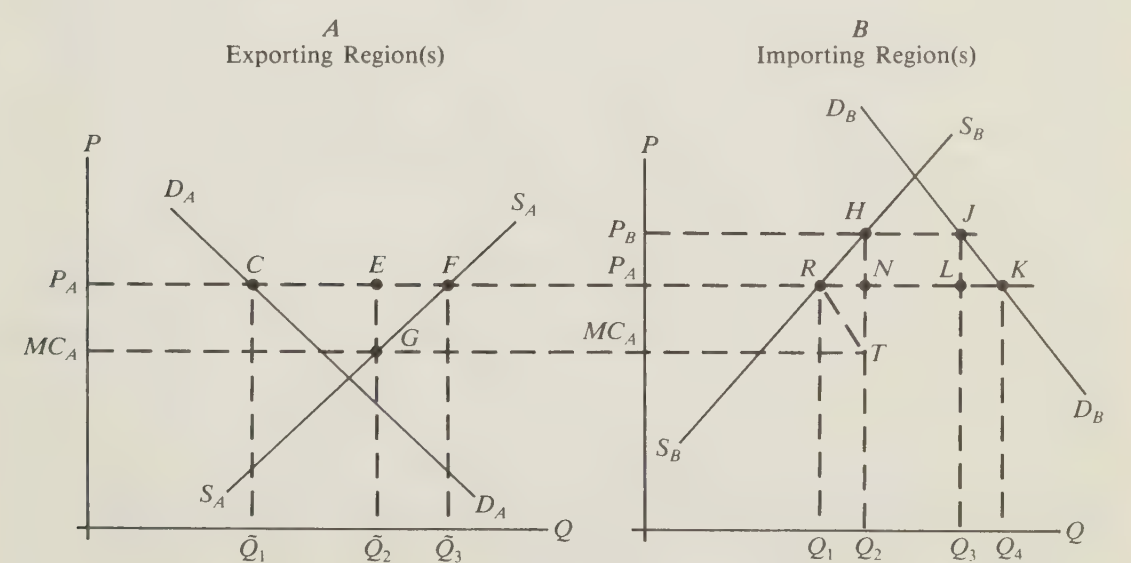
In addition to this redistribution of welfare between and within regions, there is a deadweight economic loss that represents an important part of the social cost of marketing boards. Netting out region B's loss from region A's gain leaves a net loss that can be shown to be equal to the sum of the triangles  $CHK$  and  $EFG$  in region A and triangles  $MNP$  and  $LRT$  in region B.<sup>6</sup> These welfare triangles can be given the following intuitive explanation. Triangles  $CHK$  and  $MNP$  constitute the consumption cost of marketing boards in that consumers value their foregone consumption of agricultural output as  $\tilde{Q}_1CH\tilde{Q}_2$  and  $Q_3MNQ_4$ , respec-

tively. Yet the resources released from exports that are no longer needed to pay for agricultural imports are capable of producing extra consumption goods for Canadians that are worth only  $\tilde{Q}_1KH\tilde{Q}_2$  and  $Q_3PNQ_4$ , respectively, to consumers. Consequently, the welfare of consumers deteriorates by the amounts of the triangles  $CHK$  and  $MNP$ , respectively. The triangles  $EFG$  and  $LRT$  represent the production cost of marketing boards in that they measure the additional cost of supplying  $\tilde{Q}_3 - \tilde{Q}_4$  and  $\tilde{Q}_1 - \tilde{Q}_2$  to the market from domestic sources instead of relying on exports costing  $\tilde{Q}_3GF\tilde{Q}_4$  and  $Q_1TRQ_2$ , respectively, to pay for supplies from foreign sources.

This particular measurement of welfare loss should be considered a minimum estimate. There are at least two other kinds of social cost that should be taken into account. The first is expenditures by producers on rent seeking. At least some portion of the producers' gain will be used by producers to maintain and defend their monopoly position in the domestic market. Marketing board levies which pay for administration and lobbying activities are perhaps the most visible form of rent-seeking activity. Borchering and Dorosh (1980) suggest that nearly one-fifth of the extra producer income created by the program may be dissipated in this manner. A further source of social cost, also not shown in the diagram, is the regulation of farm size which, if it involves relinquishing scale economies in the industry, may be viewed as a leftward or upward shift of the supply curve in Figure 1-1.<sup>7</sup> This cost, which is inframarginal for the industry, could potentially be the most serious of all the various welfare losses.<sup>8</sup>

Consider next the question of provincial self-sufficiency. The welfare effects of moving in this direction are sketched in Figure 1-2, which takes the equilibrium with marketing boards in Figure 1-1 as its starting point.

**FIGURE 1-2 Further Provincial Self-Sufficiency and Economic Welfare**





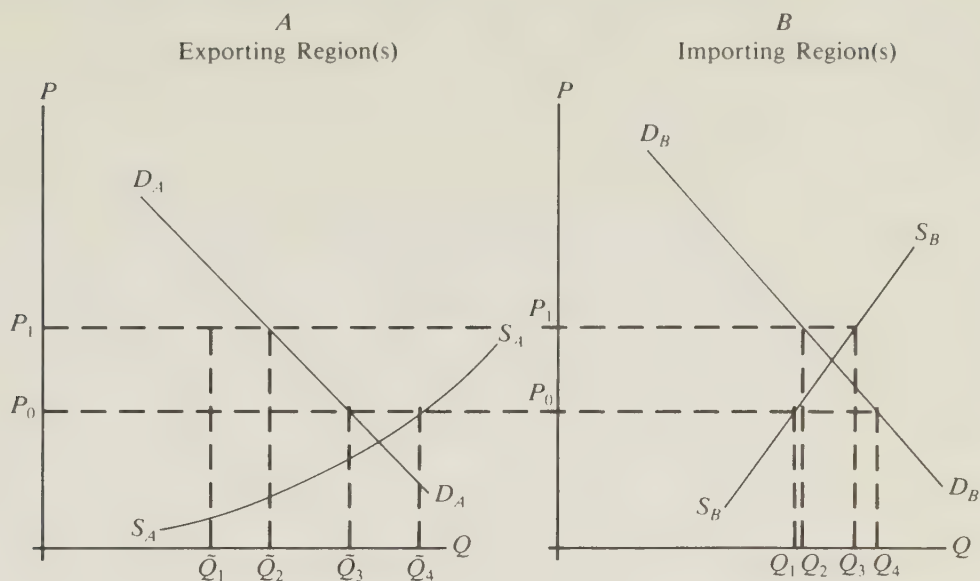
Assuming  $P_A$  in Figure 1-2 equals  $P_{MB}$  in Figure 1-1, region A in Figure 1-2 is assumed to be exporting  $\tilde{Q}_1 - \tilde{Q}_3$  of its output to region B, and prices, adjusted for transportation costs, are uniform in both areas. Next, assume that quota is reallocated between the two regions, so that the export region is required to retrench in production to  $\tilde{Q}_2$  while region B is permitted to expand from  $\tilde{Q}_1$  to  $\tilde{Q}_2$ . As a result of this quota redistribution, price rises in the import region to  $P_B$  and the regional price differential ( $P_B - P_A$ ) may be viewed as the tariff equivalent of this particular quota or market sharing policy.

Consumers in the importing region undergo a diminution in welfare shown as the trapezoidal area  $P_B J K P_A$ , representing the maximum amount of income which they would voluntarily pay to avoid the price increase. This loss is offset in part by a clearcut gain to producers in the importing region equal to the area  $P_B H R P_A$ . The welfare change experienced by producers in exporting regions is more ambiguous. They experience a loss in producers' surplus or economic rent of  $EFG$ , but they also benefit in the amount  $HJLN$  from being able to sell some of their previous exports at a higher price in region B. Thus the export region can either gain or lose, depending on the relative size of this terms-of-trade effect. As shown in Figure 1-2, producers in both regions are better off at the expense of consumers in region B.

The net welfare costs of striving for provincial self-sufficiency when producer benefits are weighed against consumer losses appear as the sum of the triangles  $EFG$ ,  $HNR$ , and  $JLK$ . Since  $\tilde{Q}_2 - \tilde{Q}_3$  equals  $\tilde{Q}_1 - \tilde{Q}_2$  by construction, the triangle  $EFG$  can be transferred to the right-hand panel where it becomes the triangle  $RNT$  and the net welfare cost is transformed into the triangles  $HTR$  and  $JLK$ . As before, the triangle  $HTR$  is the production cost of the implicit tariff insofar as it measures the misallocation of productive resources under the pressure for provincial self-sufficiency or, alternatively, the excessive production cost incurred by departing from the principle of comparative advantage. At output  $Q_2$  in region B, global production costs would decline by  $HT$  if a small unit of production were shifted from region B to region A and the difference in each region's marginal costs of production would diminish toward zero as output levels approached  $Q_1$  in region B. Also as before, the triangle  $JLK$  measures the deadweight consumption loss from differentially higher consumer prices in region B.

The importance of market interdependence can also be appreciated from a slight readaptation of Figure 1-2. Suppose both panels of this diagram refer to a single region which is an exporter of one agricultural product and an importer of another. Under a market sharing scheme which restricts the region's exports from  $\tilde{Q}_3$  to  $\tilde{Q}_2$ , resources worth  $Q_2 G F \tilde{Q}_3$  will be reallocated to other activities. The mobility of these resources within agriculture is apt to be much higher than that between agricultural and non-agricultural activities, so it is highly likely that at

FIGURE 1-3 Marketing Boards and Trade Reversals



least some of these resources will be reemployed in the region's import competing agricultural activities. Such a resource shift will show up as a rightward movement of the region's supply curve in the import activity which will partially extinguish interprovincial trade in that commodity. Thus, attempts to curb interprovincial trade in some agricultural commodities may serve to diminish trade levels in virtually all commodities.<sup>9</sup>

Figure 1-3 illustrates another possibility, that of a marketing board induced trade reversal, in which export regions become importing regions. Instead of limiting interprovincial trade, marketing boards are seen here as agents with the potential to alter the direction of trade. In the absence of a marketing board, equilibrium occurs at the price  $P_0$  at which trade is balanced between the two regions. If a marketing board were to appear and allocate quota in the amounts of  $\tilde{Q}_1$  to the exporting region and  $Q_3$  to the importing region, the effect would be a rise in price in both markets to  $P_1$  at which price an exportable surplus  $\tilde{Q}_2 - \tilde{Q}_3$  would emerge in the importing region and be absorbed as the amount  $\tilde{Q}_1 - \tilde{Q}_2$  in the exporting region. Unlike the earlier situation, price would be uniformly higher in both regions. Welfare losses would be of the same type as before but would be larger in this case because of the larger production distortion and the additional consumption distortion in the exporting region.

Several interesting conclusions or hypotheses emerge from the discussion to this point. First, and most importantly, the analysis has disclosed that the essence of market segmentation is regional price variation. If marketing boards have fragmented the Canadian market in the past, or promise to do so in the future, the impact should be observable as a growing dispersion in regional price levels for producers. The means by which this price variation is translated into consumer



price variation is, however, something of a mystery since marketing boards have no control at all over interprovincial movements of processed products. In a strictly competitive environment, consumer or retail price variation could not occur and any attempt by producers to receive a differentially higher price would be analogous to the imposition of a tax on processors in a particular jurisdiction. A clue to solving this puzzle is offered by Haack, Hughes, and Shapiro (1981, p. 30), who note that buyers are reluctant to take advantage of cheaper priced imports, preferring instead to maintain good relations with local suppliers. If this behaviour is general, regional differences in producers' prices will tend to show up as similar price differences at the retail level.

A further implication of the analysis concerns the regional variation in quota prices. If quota values reflect the capitalized value of annual increments to producers' rents, as Barichello (1983), Arcus (1981), Borchering and Dorosh (1980), and Grubel and Schwindt (1977) convincingly demonstrate, the value of quota, assuming it is transferable, should be higher in exporting than in importing regions. The reason for this is that the gap between price and marginal cost is ordinarily larger in quota-constrained export regions than it is in market-constrained import regions, as shown in Figure 1-3.

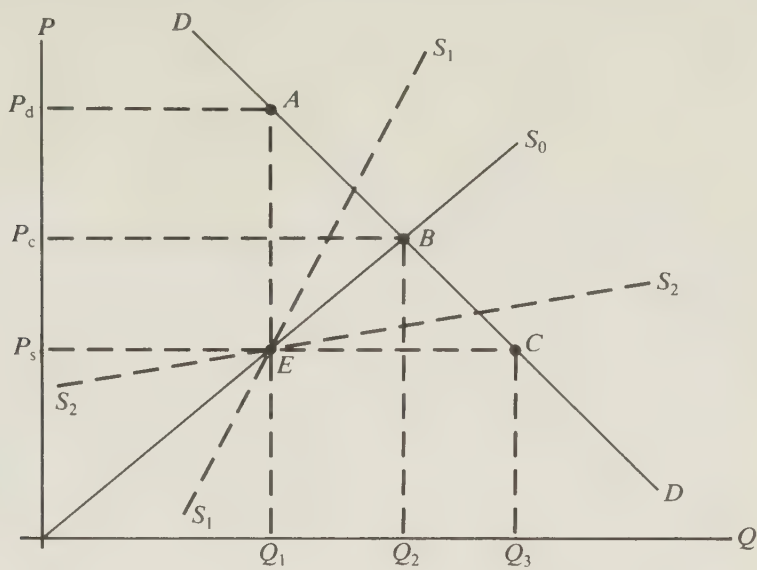
These implications are examined in the section below on the welfare costs of provincial self-sufficiency, which also contains some estimates of welfare cost corresponding to the triangles described in Figure 1-2. In order to compare these results with earlier analyses of the welfare cost of marketing boards, a summary of the salient features of this previous work is presented.

## **Empirical Studies of the Cost of National and Provincial Self-Sufficiency**

In this section we will survey earlier efforts to establish the welfare cost of marketing boards that focus primarily on resource misallocation within the country or province and ignore the interregional issues discussed above. Figure 1-4 serves to distinguish two different approaches to the measurement of the welfare cost attributable to the behaviour of marketing boards. Ordinary data allow us to observe only a single point on the demand curve,  $P_d$ , and, likewise, only one point on the supply curve,  $P_s$ . All of the other information contained in the diagram must be inferred from empirical studies. Different counterfactual situations may be chosen with which a comparison may be made between the actual market outcome and some hypothetical equilibrium that would occur in the absence of a marketing board. One approach is to ignore the existence of foreign markets and assume that, left to its own devices, the market would clear at the price and quantity configuration of  $P_e$  and  $Q_2$ .



FIGURE 1-4 Alternative Models of Welfare Cost



With this choice, the welfare cost of a marketing board appears as the triangle *ABE*.

An alternative approach recognizes the influence of foreign markets and assumes that the equilibrium price would be the world price, shown as  $P_s$  in Figure 1-4, at which domestic production is  $Q_1$  and domestic consumption is the amount  $Q_3$ , imports being the difference between the two quantities. Given this selection, one which was made earlier in constructing Figure 1-1, the welfare cost of the marketing board is measured by the triangle *BCE*. If the supply curve is unit-elastic and conforms to a 45 line, as  $S_0$  is drawn in Figure 1-4, both approaches will yield the identical measure of welfare cost. For non-unitary values of the supply elasticity, as shown by  $S_1$  or  $S_2$ , the two approaches will generate divergent measures of welfare cost. Fortunately, as will be seen below, most empirical studies of welfare cost have adopted the unitary supply elasticity assumption, although this assumption is not by itself sufficient to make the choice of model a matter of indifference.

The results of existing empirical work are conveniently summarized in Table 1-1.<sup>10</sup> Differences among the various studies can be attributed to discrepancies in elasticity values and in the measurement of price distortions, to the degree of cost inclusiveness, and, to some extent, in the choice of the underlying model of welfare effects. Harling and Thompson (1983) and Barichello (1981), for industrial milk, adopt a world market reference point, while all of the other studies ignore world markets in establishing an appropriate counterfactual situation. Since welfare costs are incurred largely for the purpose of transferring income to producers, all of the measurements of welfare cost shown in Table 1-1 are expressed as a fraction of the benefits bestowed to producers.<sup>11</sup>

With the exception of Borcharding and Dorosh (1980) and Barichello

TABLE 1-1 Estimated Welfare Costs of Marketing Boards: A Summary

Author	Demand Elasticity	Supply Elasticity	Welfare Cost (millions)	Producer Benefit (millions)	Welfare Cost Per Dollar of Producer Gain	Inclusion of		
						Adminis- tration Costs	Supply Shifts	Rent Seeking
<b>a. Eggs</b>								
Barichello (1982)	-0.23	1	19	55.2	0.34	Yes	No	No
Veeman	0.12	1	2.2	55.7	0.04	No	No	No
Harling-Thompson	-0.11 to -0.22	0.03 to 0.94	4.9	90-94	0.04-10	No	No	No
Borcherding-Dorosh (B.C. only)	-0.75	5	3.3	5.3	0.60	Yes	Yes	Yes
<b>b. Broilers</b>								
Barichello (1982)	-0.6	1	13	56.6	0.24	No	No	No
Veeman	0.56	1	8.6	97	0.09	No	No	No
Harling-Thompson	-0.31 to -0.44	0.12 to 0.94	14.5 to 26	165-172	0.09-0.16	No	No	No
<b>c. Turkeys</b>								
Veeman	-1.09	1	7.9	32.8	0.24	No	No	No
<b>d. Milk</b>								
Grubel-Schwindt (B.C. only)	-0.35	0.5	0.18	6.3	0.03	No	No	No
Barichello fluid industrial	-0.35 -0.9	1 1	52.4 161.8	365.8 628.7	0.14 0.26	No Yes	No No	No No

(1982), all of the estimates of welfare cost capture only the size of the relevant triangles and ignore the possibility of some welfare-relevant rectangles. The column labelled as administration costs refers to the cost of surplus disposal, which is particularly important in the case of eggs and industrial milk. Supply shifts pertain to the cost-elevating effects of marketing boards' efforts to regulate farm size and dilute incentives for introducing new technology. Finally, rent seeking recognizes the organizational costs of defending and maintaining a monopoly position. In the case of eggs, inspection of Table 1-1 reveals that these welfare rectangles may be more important than the welfare triangles. Focussing exclusively on the triangles, the cost of transferring a dollar of income to egg producers may be trivially small, on the order of 4 cents. However, when the rectangles are considered as well, the cost may rise to as much as 60 cents per dollar of income transferred.

The estimated welfare losses are also sensitive to the size of the demand elasticity and increase proportionately with the size of that parameter. The more consumers react to a distortion of given size, the larger is the induced misallocation of resources. In the limit, if there were no reallocation of resources because consumers failed to react to higher prices, there could be no misallocation of resources either. Looking at Veeman's estimates, for example, the welfare cost of turkey intervention is about six times higher in turkey than in eggs, reflecting in part the significantly higher demand elasticity for turkeys.<sup>12</sup>

On the basis of his careful work, Barichello (1982) feels that, as a rough order of magnitude, about 25 cents is wasted on average to enhance the incomes of milk, egg and poultry producers by one dollar. This economic cost is incurred in order to supplement the average income of milk producers by about \$20,000 annually, and an even larger amount, \$25,000 per farm, in the case of poultry and egg producers.

Almost no empirical work has been done in the area of quantifying the economic costs of provincial self-sufficiency. In an interesting paper, Clements and Carter (1984) catalogue the impressively long list of federal and provincial programs that influence the pattern of interprovincial trade in pork, and conclude that the joint impact of these policies on historical trading relationships is immense and invariably in the direction of greater provincial autarchy.

The study by Cappe and Wogin (1981) is unique in attempting to measure the interregional misallocation of resources which stems from the spatial distribution of the milk sharing quota. The starting point for the analysis is the observation that some provinces fail to fulfil their quota, suggesting that the *CDC*'s uniform target price is equal to marginal cost in these areas. In other areas that are quota constrained, producers would like to produce more than the quota allows, implying that their marginal costs of production are below the target price. If marginal units of production were shifted to these provinces from others



where the quota is not binding, the total costs of producing a given level of output would fall by the difference in marginal cost between the two areas and, in the limit, marginal cost would be equalized across all regions. In terms of Figure 1-2, the total saving in resource costs would correspond to the triangular area *RHT* in the right-hand panel.

Cappe and Wogin (1981), drawing on data for the value of milk quota in different regions, conclude that marginal costs are about 24 percent less in quota-constrained regions than elsewhere. If quota were reallocated until interregional differences in marginal cost disappeared, there would be an annual resource saving worth about \$4 million. Assuming that supply elasticities have a unitary value, approximately one million hectolitres of output (2.3 percent of total output) would have to be reallocated in this fashion in order to realize this economic benefit. Looking again at Table 1-1, we see that the interregional welfare loss is tiny in comparison with Barichello's estimated welfare cost of \$162 million for industrial milk. Taking account of it would add only about 2.5 percent to the total of the other allocative losses calculated by him. Losses of the latter type are frequently inframarginal, involving the measurement of large rectangles, and dwarf the smaller interregional welfare loss, which is a marginal calculation measured as the area of a small triangle. It remains to be seen if such small losses are also typical in other agricultural sectors, the task taken up in the following section on the welfare costs of greater provincial self-sufficiency.

## Welfare Costs of Greater Provincial Self-Sufficiency

An attempt should now be made to hang some empirical findings from the theoretical scaffold that was developed in the section on the welfare cost of marketing boards. Referring again to Figure 1-2, it can be seen that excessive production costs, the triangle *RHT*, can be measured as  $\frac{1}{2} (P_B - MC_A) \Delta Q$  where  $\Delta Q$  is equal to  $(Q_2 - Q_1)$  and  $MC$  is marginal cost or, as  $\frac{1}{2} (MC_B - MC_A) \Delta Q$ , since  $P_B = MC_B$ . Letting  $\epsilon_s$  denote the supply price elasticity of output, this expression can be rewritten as

$$\frac{1}{2} \frac{(MC_B - MC_A)}{MC_B} P_B Q_2 \epsilon_s \frac{(P_B - P_A)}{P_A} \quad (1)$$

Similarly, the deadweight consumption loss in region B, the triangle *JLK*, can be estimated as  $\frac{1}{2} (P_B - P_A) (Q_4 - Q_3)$ . If  $n_d$  is the value of the demand price elasticity, this welfare loss expression can be repackaged so it appears as

$$\frac{1}{2} n_d (P_B Q_3) ((P_B - P_A) / P_B)^2 \quad (2)$$

Estimation of equations (1) and (2) requires accurate information on regional price and cost differentials as well as some knowledge of the

appropriate values for the supply and demand price elasticities. The most crucial bit of data, information on regional costs of production, is also the most difficult to obtain. The usual approach is to estimate directly the average costs of production either for the industry or for a representative farm, as the national marketing agencies attempt to do. An indirect and, for the purposes of economic analysis, preferable approach is to infer supply prices or marginal production costs from observations of quota values for different products and areas. The papers by Barichello (1982) and Veeman (1982) are based on this approach and represent the ideal method of cost estimation for this study. However, since quota is not tradeable in all of the Prairie provinces and some of the Maritime provinces, a complete set of regional cost data cannot be obtained from this source. Moreover, even if such data were available, Barichello (1983) has shown that it is a matter of some subtlety to infer correctly the annual rental value of a quota from observed quota values. Forbes, Hughes, and Warley (1982) and Veeman (1982) have also explored some of the pitfalls that may plague research efforts based on an analysis of quota values.

For what it is worth, Arcus (1981) and Brinkman (1981) both report quota values for provinces that are broadly consistent with the hypothesis that values will tend to be higher in quota-constrained export regions like Ontario. However, both studies were forced to impute relatively low values for the Prairie provinces and this imputation procedure severely weakens the reliability of the interregional pattern of quota value that is reported. Moreover, British Columbia is observed to have noticeably higher quota values for milk, eggs, chickens and turkeys than other areas and the reasons for this discrepancy are not at all obvious.

Some notion of the position of each province in interprovincial trade can be surmised from Table 1-2. There the share of each province's population in total population is taken to be a proxy for consumption in each region, assuming that per capita consumption differences among the provinces are minor. Unfortunately, there are no data against which this assumption may be checked. Remaining columns of Table 1-2 show the share of each province in the production of eggs, broilers and turkeys. A comparison between the consumption share and the production share for each province indicates whether it is a net exporter or importer of the commodity in question.<sup>13</sup> A province is labelled as being either small or large depending on its population size and on the difference in size between the population and production shares.

From Table 1-2 it can be concluded that Manitoba and Ontario are large net exporters of eggs which find markets in Quebec, Saskatchewan, Alberta, and all of the Atlantic provinces except Nova Scotia. These trade positions are largely reversed in the case of broilers, where Quebec and Alberta are significant net exporters to Ontario, Saskatche-

TABLE 1-2 Provincial Trade Flow Indicators

Province	Population		Production Share			
	Share (1981) %	Eggs (1981) %	Status	Broilers (1983) %	Status	Turkeys (1983) %
B.C.	11.3	12.9	small exporter	10.8	self-sufficient	8.7
Alta.	9.5	8.2	small importer	10.3	small exporter	7.7
Sask.	4.0	3.5	small importer	3.4	small importer	4.6
Man.	4.2	10.4	large exporter	5.0	small exporter	7.9
Ont.	35.4	41.0	large exporter	33.3	large importer	45.0
Que.	26.5	16.0	large importer	29.6	large exporter	23.2
N.B.	2.86	1.9	small importer	2.7	self-sufficient	1.0
N.S.	3.5	4.1	small exporter	3.4	self-sufficient	1.9
P.E.I.	0.5	0.6	small exporter	0.1	small importer	0.0
Nfld.	2.3	1.8	small importer	1.1	small importer	—

Sources: Population: Statistics Canada, 1981 Census; production: Statistics Canada. *Production of Poultry and Eggs*, cat. no. 23-202 for broilers and turkeys, CEMA for eggs.



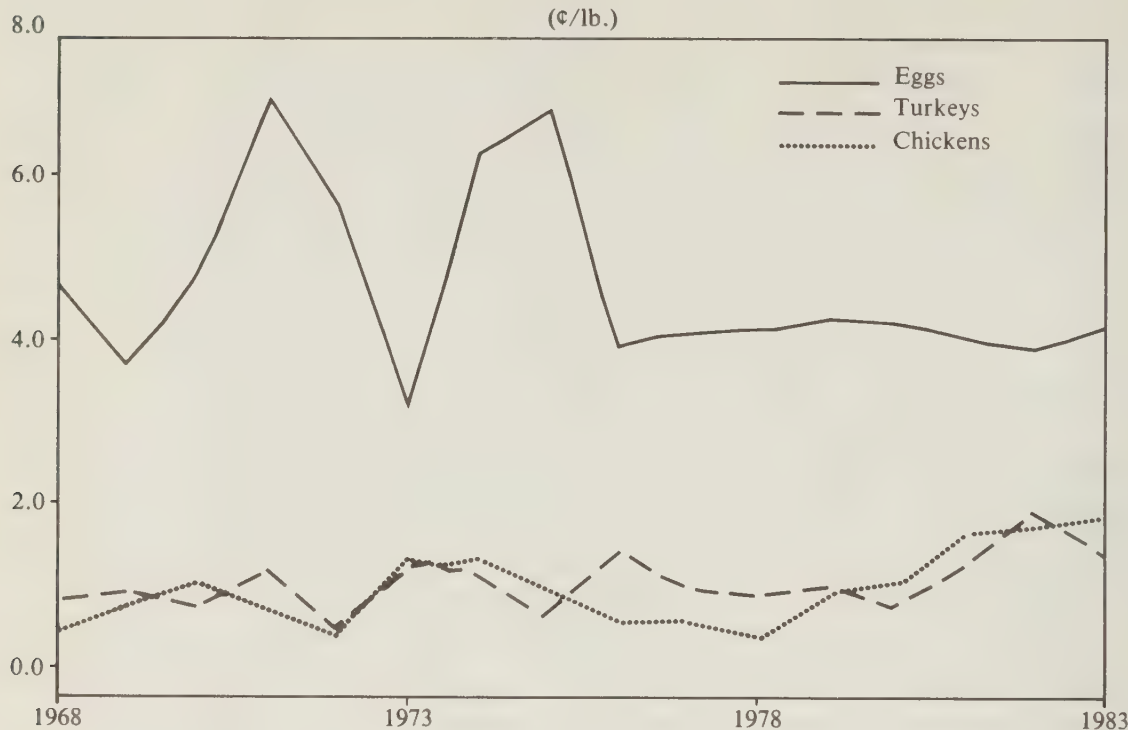
wan, and some of the Atlantic provinces. Manitoba and Ontario are both large net exporters of turkeys to all of the other provinces.

These trade patterns are by and large consistent with the interprovincial flows shown in Appendix Tables 1-A2–1-A4. Although none of these tables contains highly reliable data, the gross trade flows for eggs in Appendix Table 1-A2 are more revealing than the flows in the other two tables for live chickens and turkeys. About 10 percent of total egg production enters into interprovincial trade compared to a much smaller percentage, 1.4 and 2.1 percent, respectively, for live turkeys and chickens. Figures on interprovincial movements of live fowl are somewhat misleading, however, for they indicate nothing about shipments of processed products. Looking at Appendix Table 1-A4, for example, it would be a mistake to conclude that Ontario is a net importer of turkey. In fact, Ontario imports live turkey from Quebec, processes it, and then sends it and much more back to Quebec. The trade flows outlined in Table 1-2 are much less sensitive to the provincial location of poultry processing capacity than are those in Appendix Table 1-A4.

Earlier it was concluded that any tendency or trend toward market segmentation would be revealed by a larger dispersion of provincial consumer and producer prices. Since reported consumer prices for eggs, chickens and turkeys exhibit a wide range of values in each province, the behaviour of producer prices before and after the creation of national marketing boards has been chosen to examine this hypothesis. Figure 1-5 displays for the three feather commodities the annual standard deviation of provincial producer prices around the national mean. There is some support for the hypothesis of growing market fragmentation in the case of both chickens and turkeys. Prior to 1978 the average standard deviation for chickens was 1.17¢/lb. Between 1978 and 1983, the average value of that standard deviation increased to 1.77¢/lb. In the case of turkeys, the increase in standard deviation was less dramatic, rising from an average value of 1.18¢/lb. before 1974 to an average value of 1.50¢/lb. after that year. The coefficient of variation is also significantly higher after 1974. The evidence is less clearcut in the case of eggs but the hypothesis is also more difficult to test. If anything, the dispersion in the price of large grade A eggs is less now than it was before the creation of CEMA, a result which no doubt reflects the use of a centralized pricing formula. It would be useful to test the hypothesis against the price performance of other egg varieties which are not subject to this pricing formula, but this data is unavailable. Some data are available, however, that will allow us to construct a crude estimate of the welfare loss associated with interprovincial trade distortions in all three of these commodities.

To estimate equations (1) and (2) this study has relied upon cost data compiled by the Ontario Ministry of Agriculture and Food in its attempts to make a case for the use of the comparative advantage principle in

**FIGURE 1-5 Standard Deviation of Producers' Price about the National Average, 1968-83**



Source: Agriculture Canada, *Poultry Market Review*, Ottawa, various issues.

allocating overbase quota.<sup>14</sup> The data base has the virtue of being complete, in the sense that there are cost estimates for each province and shipping costs from one province to another are considered. It has the important disadvantage, however, of referring to average cost rather than the theoretically proper marginal cost concept. The best that can be hoped for is that the indicated provincial differences in average cost are mirrored in corresponding differences in marginal cost.

Table 1-3 contains the components of the welfare cost calculation for eggs. In the first row the weighted average egg price to producer is given for each province. The provincial cost of production appears in the next row, and the lowest supply price, including transportation charges, to each province appears as line three. The province with the lowest supply price is assumed to be the sole supplier to a given province except that, in the case of Alberta, both Manitoba and Saskatchewan are assumed to export to that market since the difference in their Alberta landed cost is only about one cent per dozen. This single supplier assumption is a fairly restrictive view of interprovincial trade flows that works to impart a downward bias to the calculation of welfare cost. Thus British Columbia, for example, is assumed to be self-sufficient despite the fact that both Manitoba and Saskatchewan could each supply the British Columbia market at a cost less than the administered price in British Columbia but more than the British Columbia production cost. This assumption may not be too wide of the mark since CEMA data

TABLE 1-3 Price, Cost of Production, and Welfare Cost for Eggs, 1982

	B.C. <sup>1</sup>	Alta. <sup>2</sup>	Sask. <sup>3</sup>	Man. <sup>4</sup>	Ont. <sup>5</sup>	Que. <sup>6</sup>	N.B. <sup>7</sup>	N.S. <sup>8</sup>	P.E.I. <sup>9</sup>	Nfld. <sup>10</sup>	Total All Provinces
Price (¢/doz.)	90.4	87.8	86.8	82.5	86	89.4	92.5	91.3	93.6	99.7	—
Cost of Production (¢/doz.)	88.4	103.6	83.3	80.9	80.2	84.9	96.4	101.8	105.3	103.1	—
Lowest Supply Price <sup>e</sup>	88.4 <sup>1</sup>	87.6 <sup>3</sup>	83.3 <sup>3</sup>	80.9 <sup>4</sup>	80.2 <sup>5</sup>	83.4 <sup>5</sup>	89.2 <sup>5</sup>	89.8 <sup>5</sup>	89.8 <sup>5</sup>	96.2 <sup>5</sup>	—
Excess Cost <sup>a</sup> (¢/doz.)	—	0.16	0.50 <sup>d</sup>	—	—	1.50	7.2	12.0	15.5	6.97	—
Excess Price <sup>b</sup> (¢/doz.)	—	0.2	3.5	—	—	5.0	3.3	1.5	3.8	3.5	—
Value of Output (\$000)	—	\$30,751.5	12,579	—	—	59,284.5	7,348.5	15,942	2,104.5	6,082.5	—
Welfare Cost of Trade Distortions <sup>c</sup> (\$000)	—	\$6.4	3.7	—	—	40.1	11	18	6.7	8.6	\$81.7
(ε <sub>s</sub> = 1; n <sub>d</sub> = -.22)											

Sources: Price: Agriculture Canada, *Poultry Market Review*; cost of production: Ontario, Ministry of Agriculture and Food, *Ontario Signatories' Position on the Allocation of Overbase Quota for Chicken, Eggs and Turkey*, April 1983.

- a. The difference between cost of production and lowest supply price.
- b. The difference between price and lowest supply price.
- c. Equations (1) and (2), above, are used to determine welfare cost.
- d. Manitoba is assumed to export some eggs to Saskatchewan with a cost advantage of .5¢/doz.
- e. The superscript corresponds to that of the supplying province.



indicate that British Columbia imports from Manitoba are only about 3 percent of British Columbia's total production. Thus Manitoba may be able to supply some areas of British Columbia at a cheaper cost than local suppliers, but our data are not refined enough to detect this possibility.

The data indicate that price exceeds the cost of production in all of the exporting regions, while price is less than production cost in the importing provinces. In terms of the model outlined in the previous section and equations (1) and (2) derived from that model, we calculate the additional resource costs that are incurred whenever local production is permitted to displace lower-cost imports in the importing regions and the cost of the consumption distortion arising from differentially higher consumer prices in those areas. Initially the differences in marginal resource cost are shown in row four as the excess cost and corresponds to the term  $(MC_B - MC_A)$  in equation (1).<sup>15</sup> Since price does not match measured costs in the importing regions, the initial consumption distortion is taken to be the difference between the actual producer price and the landed import price. This difference, labelled as excess price in row five, corresponds to the term  $(P_B - P_A)$  in equation (2).

The welfare cost arising from provincial variation in producers' prices and costs of production is shown in the final row of Table 1-3. Drawing on the econometric findings of Hassan and Johnson (1976), the elasticity of demand is taken to be  $-.22$  while a value of unity is assumed for the supply elasticity. Because the demand elasticity is relatively low and provincial cost differences are extremely modest in size, the overall welfare cost of interprovincial trade distortion in eggs is only \$81,700. Nearly half of this cost is incurred as a result of excessive import substitution in the province of Quebec. Of the two sources of welfare cost, the distortion in the location of production is much more important than that in consumption, accounting for almost 85 percent of the overall welfare cost.

Tables 1-4 and 1-5 present similar data and estimates of welfare cost for broilers and turkeys. In the case of broilers, Manitoba is the cheapest source of supply for all provinces west of that jurisdiction and Ontario is the lowest cost supplier for all of the Atlantic provinces, although the cost of production in Quebec is sufficiently close to that in Ontario for Quebec, conceivably, to share in this trade flow. Moreover, producers in Quebec could profit from sales in Ontario just as some Ontario producers could trade profitably with Quebec; but, given the closeness of their price-cost structures, there would be no welfare consequences associated with this particular trade flow. Based on Hassan and Johnson's econometric research, the price elasticity of demand for broilers is taken to be  $-.6$  while a value of one is assumed for the supply elasticity. The overall welfare cost of trade distortions in broilers is estimated at

TABLE 1-4 Price, Cost of Production, and Welfare Cost for Broilers, 1980-81

	B.C <sup>1</sup>	Alta. <sup>2</sup>	Sask. <sup>3</sup>	Man. <sup>4</sup>	Ont. <sup>5</sup>	Que. <sup>6</sup>	N.B. <sup>7</sup>	N.S. <sup>8</sup>	P.E.I. <sup>9</sup>	Nfld. <sup>10</sup>	Total All Provinces
Price (¢/lb) (eviscerated)	65.6	66.5	62.2	60.8	65	64.1	65.4	66.2	—	77.5	—
Cost of Production (¢/lb)	66.4	65.4	67.1	59.1	58.1	59.9	63.6	62.8	65.1	72.8	—
Lowest Supply Price <sup>d</sup>	64.74	63.04	61.64	59.14	58.15	59.96	62.25	62.65	62.55	67.35	—
Excess Cost <sup>a</sup> (¢/lb)	1.64	2.33	6.58	—	—	—	1.4	0.2	2.6	5.5	—
Excess Price <sup>b</sup> (¢/lb)	0.6	3.5	0.6	—	—	—	3.2	3.6	2.5	5.5	—
Value of Output (\$000)	67,180	63,852	19,643	—	—	—	16,880	21,714	203	6,898	—
Welfare Cost of Trade Distortions <sup>c</sup> (\$000)	22.7	92.4	95.2	—	—	—	24.4	32.2	0.6	35.1	\$302.6
$(n_d = -.6; \epsilon_s = 1)$											

Sources: Price: Statistics Canada, *Production of Poultry and Eggs*, cat. no. 23-202; cost of production: Ontario, Ministry of Agriculture and Food, *Ontario Signatories' Position on the Allocation of Overbase Quota for Chicken, Eggs and Turkey*, April 1983.

a. The difference between cost of production and lowest import price.  
b. The difference between actual price and lowest import price.  
c. Equations (1) and (2), above, are used to determine welfare cost.  
d. The superscript corresponds to that of the supplying province.

TABLE 1-5 Price, Cost of Production, and Welfare Cost for Turkeys, 1980-81

	B.C. <sup>1</sup>	Alta. <sup>2</sup>	Sask. <sup>3</sup>	Man. <sup>4</sup>	Ont. <sup>5</sup>	Que. <sup>6</sup>	N.B. <sup>7</sup>	N.S. <sup>8</sup>	P.E.I. <sup>9</sup>	Nfld. <sup>10</sup>	Total All Provinces
Price (¢/lb) (eviscerated)	79.3	79.7	77.8	77.1	79.2	74.7	77.7	77.6	—	—	—
Cost of Production (¢/lb)	78.4	80.4	77.6	73.6	72.2	75.5	79.7	80.7	—	—	—
Lowest Supply Price <sup>d</sup>	78.4 <sup>1</sup>	77.6 <sup>4</sup>	76.2 <sup>4</sup>	73.6 <sup>4</sup>	72.2 <sup>5</sup>	74.6 <sup>5</sup>	76.3 <sup>5</sup>	76.8 <sup>5</sup>	—	—	—
Excess Cost <sup>a</sup> (¢/lb)	—	2.8	1.4	—	—	0.9	3.4	3.9	—	—	—
Excess Price <sup>b</sup> (¢/lb)	—	2.1	1.6	—	—	0.1	1.4	0.6	—	—	—
Value of Output (\$000)	—	15,556	7,016	—	—	35,668	1,917	2,948	—	—	—
Welfare Cost of Trade Distortions <sup>c</sup> (\$000)	—	15.5	2.9	—	—	2.3	2.1	3.7	—	—	\$26.5
$(n_d = -1.09; \epsilon_s = 1)$											

Sources: Price: Statistics Canada, *Production of Poultry and Eggs*, cat. no. 23-202; cost of production: Ontario, Ministry of Agriculture and Food, *Ontario Signatories' Position on the Allocation of Overbase Quota for Chicken, Eggs and Turkey*, April 1983.

- The difference between cost of production and lowest import price.
- The difference between actual price and lowest import price.
- Equations (1) and (2), above, are used to determine welfare cost.
- The superscript corresponds to that of the supplying province.



\$302,600, substantially higher than for eggs. About 60 percent of this cost is attributable to distortions in the location of production.

The trade picture for turkeys resembles that for broilers. On the basis of comparative advantage, Manitoba appears to be the most efficient supplier of the markets in Alberta and Saskatchewan, while Ontario is the cheapest source of supply for all provinces that lie to the east. Nevertheless, the differences in provincial prices and costs over landed import prices are not large, with the result that the estimated welfare cost of trade distortions is only \$26,500. A demand elasticity of  $-1.09$ , following Hassan and Johnson (1976) again, is used to obtain this result. About 70 percent of this welfare cost arises from excessive import substitution in importing regions.

The combined welfare cost for the three commodities is \$410,800, not a large magnitude by any criterion. Compared to the welfare costs of national self-sufficiency, estimated as \$18.98 million for eggs and \$13 million for broilers by Barichello (1982), and as \$7.9 million for turkeys by Veeman (1982), for a total cost of about \$39.9 million, the welfare cost of movements toward provincial self-sufficiency is reasonably small, only on the order of one percent of the welfare costs of efforts to achieve national self-sufficiency. Even if our estimate of welfare loss were doubled, to account for the downward bias in our methodology, it would only approach \$1 million in size and would still be overshadowed by the other welfare-losing aspects of marketing board behaviour.

Because of the paucity of data, no attempt has been made to assess the dairy industry. As mentioned earlier, Cappe and Wogin (1981) estimate interprovincial trade distortions in industrial milk as having a welfare cost that is 2.5 percent of the welfare costs of obtaining national self-sufficiency. Their estimate is relatively larger than that presented here, owing to the greater regional variation in marginal costs that they measure based on inferences of supply prices drawn from observed quota values. Quota-constrained milk provinces may have marginal costs that are 24 percent lower than the marginal costs prevailing in other provinces. The present data, admittedly shaky, reveal no such large differences in cost conditions.

It would be worthwhile to extend this study to include an assessment of interprovincial restrictions of trade in UHT (ultra high temperature) milk. It is similar to fluid milk in its consumption characteristics but is much less perishable and more easily transported than fluid milk. Provinces are resorting to licensing regulations to prevent interprovincial shipment of this product, but this ban on interprovincial trade could have serious welfare consequences.

## Conclusions

Marketing boards have become an important policy instrument for

redistributing income toward certain groups of agricultural producers. The efficiency or welfare cost of enhancing producers' incomes in this fashion has been estimated in several recent studies. The size of these welfare costs is of interest in evaluating the so-called efficient redistribution hypothesis — that marketing boards may be the cheapest method of transferring incomes to agricultural producers, at least cheaper than the main alternative of using the tax system to effect the same amount of transfers. There appears to be an emerging consensus that it costs something on the order of 25 cents to transfer one dollar to the agricultural sector via marketing boards. If this is correct, it is by no means obvious that consumer-based finance is a cheaper source of finance than taxation would be. On equity grounds, taxation might also be preferred because it is a more progressive method of extracting funds from the economy.

This study has examined a neglected dimension of the welfare effects of marketing boards — their efforts to promote provincial autarchy and restrict the interprovincial flow of trade in dairy products, eggs, broilers and turkeys. For the latter three commodities, and apparently also for industrial milk, the additional welfare cost associated with these trade impediments is relatively small, of the order of one to two percent of the welfare cost arising from interference with the flow of international trade. While small, the essential point is that it is additive to all of the other dimensions of welfare cost that have been discussed, making the total welfare cost of marketing boards higher than previous estimates indicate.

However, the fact that current impediments to the free flow of interprovincial trade are not serious does not imply that future restrictions on these trade flows should be viewed with equanimity. As provinces move closer to self-sufficiency and as technological change occurs at different rates in some provinces, the welfare costs of interprovincial trade restrictions could become much more significant and, theoretically, could begin to approach in size those that are associated with the attainment of national self-sufficiency.

For the future, the key issue concerns the allocation of overbase quota by the national marketing agencies. In the past these agencies have tended to favour a quota allocation that encourages greater self-sufficiency. In effect, the trade war of the early 1970s continues unabated, only now it is waged in committees instead of in the marketplace. In the interests of containing the welfare costs of marketing boards, the National Farm Products Marketing Council would best serve the public interest if it insisted that more attention be paid to the principle of comparative advantage in the allocation of overbase quota. One means of implementing this principle that avoids debilitating controversy over ways of measuring relative production costs and the costs involved in accurate measurement is simply to auction off new quota to the highest

bidder, who presumably would also have the lowest marginal costs of production. A variant of this scheme would make quota interprovincially tradeable for all of the provinces. The adoption of either approach would replace essentially arbitrary decision making and help to improve the efficient allocation of resources within agriculture.



## Appendix: Selected Tables

**TABLE 1-A1 Provincial Quota Policies**

Province	Eggs	Chickens	Turkeys	Fluid Milk
British Columbia	T	T	T	T
Alberta	NT	NT	NT	T
Saskatchewan	NT	NT	NT	NT
Manitoba	NT	NT	NT	NT
Ontario	R	T	T	T
Quebec	T	T	T	T
New Brunswick	T	T	T	T
Nova Scotia	NT	NT	?	T
P.E.I.	NT	—	—	T
Newfoundland	NT	—	—	—

*Sources:* Peter L. Arcus, *Broilers and Eggs* (Ottawa, 1981) and G.L. Brinkman, *Farm Incomes in Canada* (Ottawa, 1981).

*Note:* T = transferable;

NT = non-transferable (tied to farm sale);

R = rented from the marketing board.

TABLE 1-A2 Interprovincial Movement of Table Eggs, 1981 (boxes)

To From		B.C.	Alta.	Sask.	Man.	Ont.	Que.	N.B.	N.S.	P.E.I.	Nfld.	N.W.T.	CEMA Exports	Total
B.C.	—	—	—	—	—	—	—	—	—	—	—	—	10,470	10,470
Alta.	37,987	—	—	991	—	—	—	—	—	—	—	37,969	—	76,947
Sask.	—	130,114	—	—	541	—	—	—	—	—	—	—	—	130,655
Man.	113,084	267,335	180,448	—	—	174,157	4,200	6,499	1,500	—	—	1,118	193,196	941,537
Ont.	—	—	—	—	1,500	—	1,298,428	12,070	7,800	350	3,586	—	267,052	1,590,786
Que.	—	—	—	—	3,000	138,979	—	5,360	—	—	5,711	2,044	68,684	223,778
N.B.	—	—	—	—	7,500	1,500	790	—	—	—	—	—	—	9,790
N.S.	—	—	—	—	1,500	—	354	89,201	—	—	14,548	—	8,816	114,419
P.E.I.	—	—	—	—	—	—	6,037	2,190	—	—	—	—	—	8,227
Nfld.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
N.W.T.	5	—	—	—	—	—	—	—	—	—	—	—	—	5
Total	151,076	397,449	181,439	14,041	314,646	1,309,809	115,320	9,300	350	23,845	41,131	548,218	3,106,614	

Source: Estimates of Interprovincial Movement, CEMA.

Note: These data should be treated with caution as estimates of interprovincial movement are generally regarded to be unreliable. The data include CEMA movement and movement by private trade. One box equals 15 dozen eggs.

TABLE 1-A3 Interprovincial Movement of Live Chickens, 1981 (kg: eviscerated weight)

To From	B.C.	Alta.	Sask.	Man.	Ont.	Que.	N.B.	N.S.	P.E.I.	Nfld.	N.W.T.	Exports	Total
B.C.	—	—	—	—	—	—	—	—	—	—	—	—	—
Alta.	—	—	—	—	—	—	—	—	—	—	—	—	—
Sask.	—	31,270	—	314,526	—	—	—	—	—	—	—	—	345,796
Man.	—	—	—	—	—	—	—	—	—	—	—	—	—
Ont.	—	—	—	—	—	1,651,275	—	—	—	—	—	—	1,651,275
Que.	—	—	—	—	4,942,974	—	1,777,742	—	—	—	—	—	6,720,716
N.B.	—	—	—	—	—	298,408	—	185,829	—	—	—	—	484,237
N.S.	—	—	—	—	—	—	—	—	—	—	—	—	—
P.E.I.	—	—	—	—	—	—	—	—	—	—	—	—	—
Nfld.	—	—	—	—	—	—	—	51,104	—	—	—	—	—
N.W.T.	—	—	—	—	—	—	—	—	—	—	—	—	—
Total	—	31,270	—	314,526	4,942,974	1,949,683	1,777,742	236,933	—	—	—	—	9,202,024

Source: Agriculture Canada, *Poultry Market Review*.



TABLE 1-A4 Interprovincial Movement of Live Turkeys, 1981 (kg: eviscerated weight)

To From		B.C.	Alta.	Sask.	Man.	Ont.	Que.	N.B.	N.S.	P.E.I.	Nfld.	N.W.T.	Exports	Total
B.C.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Alta.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Sask.	—	253,846	—	—	27,958	—	—	—	—	—	—	—	—	281,804
Man.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Ont.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Que.	—	—	—	—	—	841,358	—	18,369	—	—	—	—	—	859,727
N.B.	—	—	—	—	—	—	7,839	—	200,790	—	—	—	—	208,629
N.S.	—	—	—	—	—	—	—	4,912	—	—	—	—	—	4,912
P.E.I.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Nfld.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
N.W.T.	—	—	—	—	—	—	—	—	—	—	—	—	—	—
Total	—	253,846	—	—	27,958	841,358	7,839	23,281	200,790	—	—	—	—	1,355,072

Source: Agriculture Canada, *Poultry Market Review*.

## Notes

This study was completed in October 1984.

R. Barichello, C. Carter and T.K. Warley have been most helpful in discussing many of the issues raised in this paper, though ultimate responsibility for the contents is of course mine. The indirect contribution of John H. Young is also appreciated.

1. For a catalogue of Canadian marketing boards and a clear description of their various powers and functions see Veeman and Loyns (1979) and Forbes, Hughes, and Warley (1982).
2. The legitimacy of this formula has been challenged by the Consumers ' Association of Canada. See Public Hearings on the Canadian Egg Marketing Agency's Pricing Formula, Summary of Findings and Recommendations, National Farm Products Marketing Council, July 23, 1976.
3. When labour, capital and feed grains are highly mobile across provincial boundaries, there is not much reason for costs to vary differentially across regions owing to variations in factor cost.
4. This is the so-called problem of second-best in which pre-existing distortions in the economy may either offset or reinforce the impact of introducing a fresh distortion into the economy.
5. In the past, fluid milk was traded between Quebec and Ontario.
6. In welfare theoretic terms the areas of these triangles approximate the amount of income that would be needed to restore households in both regions to their original level of utility.
7. It is sometimes alleged that marketing boards, by reducing price variability, will induce lower-risk premiums on capital used in agriculture that will have the effect of increasing efficiency and shifting the supply curve rightward. There is so far no empirical evidence to substantiate this hypothesis.
8. This claim is based on the empirical studies discussed below.
9. Whether resources are reallocated within agriculture or between agriculture and the rest of the economy matters for the interpretation of welfare cost in our analysis. If it is the latter resource redeployment that is relevant, all of the qualifications found in note 4 and the discussion surrounding it apply. If the former kind of resource reallocation occurs, however, none of these reservations has any force and our measure of welfare cost will be free of any upward bias.
10. A summary of many of these empirical studies can also be found in Schmitz (1983).
11. In the context of Figure 1-1, the producers' benefit can be identified as the sum of the areas  $P_{MB}EGP_W$  and  $P_{MB}LTP_W$ .
12. This reporting of Veeman's work is based entirely on her so-called short-run calculations. Her long-run calculations are ignored because she mistakenly includes economic rents as a measure of resource cost in evaluating supply curves. Also, there appears to be a mistake in her reported equilibrium price for eggs. It cannot be 49.5¢/dozen as stated in her Table 1-1, so we have assumed the correct value is 59.5¢/dozen in our Table 1-1.
13. Gross interprovincial trade is undoubtedly much larger than these figures suggest, especially along interprovincial boundaries where a given province may be an importer in some areas and an exporter in others. Data on interprovincial shipments of eggs, and live chickens and turkeys, presented in Appendix Tables 1-A2–1-A4, tend to confirm this suspicion.
14. Ontario, Ministry of Agriculture and Food, *The Ontario Signatories Position on the Allocation of Overbase Quota for Chicken, Eggs and Turkey*, April 1983.
15. Thus between any two regions A and B engaged in trade the expression for the production cost of trade distortions is amended to become

$$\frac{1}{2} \{ (MC_B - MC_A) / MC_A \} \epsilon_s(P_B, Q_B) \{ (P_B - MC_A) / P_B \}$$

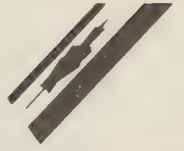
where the excess price term  $(P_B - MC_A)$  measures the incentive for import replacement in the importing regions as well as the size of the consumption distortion.

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# The Concept of Economic Union in International and Constitutional Law

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## Economic Union in International and Constitutional Law

The concept of economic union cannot be understood fully from a legal standpoint without a preliminary review of its economic and political foundations. Because the essential elements of the concept were originally defined by economics, it appears hard to assess the legal contribution in achieving the goals of such a union without first referring to economic theory. Also, insofar as the attainment of an economic union seems inseparable from a broader process of political integration, it appears risky to speak of the instrumental role of law with respect to economic objectives without discussing these more general political objectives.

### *Economic Foundation of the Concept*

Economic union and related notions, such as a common market, customs union, and free trade zone, make up a broader conceptual framework developed by economists and known as the integration theory which, in turn, is based on the exchange theory. According to a 1983 study:

The potential advantages of economic integration are derived primarily from the gains from trade among the participants in the form of more efficient production, enhanced international competitiveness, and consequently higher incomes. That is, through integrations, the participants may reap the benefits of the theory of comparative advantage through specialization and exchange.<sup>1</sup>

Rather curiously, the exchange theory itself hardly extends beyond the free movement of goods. Indeed, the economists who outlined its basic principles considered non-mobility of labour and capital as an established fact. Although production factors are much more mobile now, the exchange theory nonetheless is justified outside any reference to the free movement of persons and capital. Moreover, comparative advantages, which explain and underlie the exchange theory in causal terms, are based precisely on differences in production factors found among various participants. Some authors even claim that the free movement of goods may replace the free movement of persons and capital. In this respect, Peter B. Kennen writes:

This analysis suggests another way to look at the gains from trade. It argues that free trade can sometimes substitute for international movements of labour and capital. Factor movements and free trade both reduce differences in factor prices. Factor movements do so by erasing differences in the national endowment. Free trade does so by offsetting those differences. Trade eliminates the need for a redistribution of the factors by reallocating economic tasks. It allows every country to make the best use of its own peculiar factor endowment.<sup>2</sup>

If the exchange theory underlies the integration theory, it is also distinct from it in that it barely moves beyond the free movement of goods.

The integration theory seems more like a process. Most economists describe the process in terms of steps or degrees. In increasing order of integration, the steps usually mentioned are the free trade zone, the customs union, the common market, the economic union, and total economic integration. B. Balassa has proposed another way of presenting this progression:

From its lowest to its highest forms, integration has been said to progress through the freeing of barriers to trade (trade integration), the liberalization of factors movement (factors integration), the harmonization of national economic policies (policy integration) and the total unification of these policies.<sup>3</sup>

In this light, the free trade zone and the customs union appear to be structures based primarily on the free movement of goods, i.e., on trade integration. The free trade zone, like the customs union, eliminates customs tariffs between member states; however, unlike customs union, it allows distinct tariffs for each participating country to maintain for third parties. Given that foreign products may take advantage of differing tariff structures among various participating countries in a free trade zone to invade the entire zone, it becomes necessary to maintain customs duties within the zone on products totally or partially manufactured in foreign countries. Thus integration within a free trade zone is necessarily less extensive than within a customs union. Beyond the customs union is the concept of a common market in which production



factors are integrated. The latter concept assumes not only the complete elimination of customs duties between member countries and the establishment of a common external tariff, but the abolition of restrictions on the free movement of persons, services and capital. Beyond the common market is the economic union; it includes a degree of harmonization or centralization of economic policies, which may be more or less pronounced according to the degree of political integration. Pushed to its extreme, integration leads to the replacement of the economic union by a new, totally unified economic structure.

Although various stages in the integration process are clear, the exact nature of the gains achieved at each stage is less so. In practice, even a change from one stage to the next does not necessarily imply the achievement of each of the elements described. At the outset, i.e., in the free trade zone and the customs union, the benefits expected from the free movement of goods correspond essentially to those described by the exchange theory. The only element of doubt regarding such benefits concerns cases where the introduction of one or the other of these structures is intended to modify trade currents for the sole benefit of participants (trade diversion) rather than to increase their exchanges generally (trade creation). Thus, if it were found that more extensive integration of the Canadian economic union led to increased protectionism in relation to other countries, the process of integration should be reassessed.

The change from a customs union to a common market, i.e., from the free movement of goods to the free movement of production factors, is generally deemed advisable insofar as freely moving labour and capital are likely to be used best where their market value is highest. The resulting increase in efficiency is considered a gain. In a federal economic union, the free movement of production factors takes on a special meaning because of the absence of certain adjustment mechanisms, such as exchange rates, inherent in the international context. In such a context, the free movement of production factors reinforces the free movement of goods by permitting a more efficient adjustment. In the developed countries, furthermore, the growing importance of the services sector in relation to the goods sector tends to increase the importance of the free movement of production factors.

However, the increased value arising from a common market leads to a change in the mechanisms for redistributing profits. Instead of occurring by the regional relocation of tasks in relation to production factors, it is accomplished through the relocation of production factors on a national basis. As Thomas J. Courchene has noted, "this, in fact, is the old 'people prosperity' vs. 'place prosperity' trade-off."<sup>4</sup> The political problems that might result from such a change of perspective are immediately apparent, and few governments would accept a reduction in the importance of their territorial base in favour of other regions, although individ-

uals would ultimately benefit from it. Such governments might even speak of a breach of contract, insofar as the original decision to join the union was based on the promise of increased regional prosperity. If concrete measures are adopted by central authorities to offset the effects of the free movement of labour and capital, it is not at all obvious that the change from the free movement of goods to the free movement of production factors will result in the anticipated gains.

The change from a common market to an economic union, characterized by the implementation of common policies in a number of sectors, is based on more complex economic arguments. We should point out that the notion of “common policies,” because its very formulation refers to the opposite of decentralized policies, only has meaning in a context that excludes both absolute centralization and absolute decentralization.<sup>5</sup> In a specific field such as economics, this assumes that a relative centralization and a relative decentralization exist, so that it is possible to speak for all intents and purposes of “common economic policies.” This is precisely what characterizes the economic union by distinguishing it from the common market and total economic integration. In the common market, it is not in principle necessary to have common policies, except perhaps in the field of foreign trade relations. Thus the common market remains largely decentralized at its base. On the contrary, under total economic integration, there is no room for decentralized economic intervention, so that to describe certain economic policies as “common” has little meaning. It is therefore essentially with respect to economic union that the notion of “common policies” takes on its full meaning.

What exactly is meant by “common policies”? The first — and easiest — answer is that common policies exist when a single decision-making centre is authorized to intervene in a given field. However, this is an entirely formal conception that provides no information on the “community” or consensual nature of the policies in question. We must look beyond the simple division of powers and ask about the structure and operation of the political institutions being examined. Where several decision-making centres co-exist in the same field, policies developed at one level inevitably have more or less serious repercussions on those adopted at another level. Unless there are efficient procedures for consulting and participating in central decision making, it is also inevitable that conflicts will arise that call into question the truly “community” nature of central policies. To the extent that the centralization of policies is put in the same category as efficiency in terms of integration,<sup>6</sup> this is a factor which demands that we analyze the facts cautiously.

In opposition to the centralization of decision-making power, which is thought to be the best way to carry out common policies, the simple coordination or harmonization of policies appears to be an alternative solution, or in some instances, a transitional one. In the latter case,



however, before we can equate harmonization with common policies, it seems essential that any harmonization achieved not be simply temporary or the result of chance, but that it be based on structured, permanent collaboration. When these conditions are satisfied, it is relatively unimportant that various decision-making centres use different legal means to attain the goals set. Much more important is the fact that the “common” policies elaborated in this fashion will be more likely to succeed because they result from a general consensus. In this respect, it may well be that a “common” policy resulting from a willingness to harmonize is more efficient than a common policy imposed arbitrarily by a central authority. Again, caution is necessary in that the deadlines demanded for harmonizing decentralized policies may be sufficiently important that the efficiency of the entire operation is jeopardized.

What economic motives favour the implementation of common policies, whether it is in the form of centralization or simple harmonization? According to one argument, decentralized governments decree, or may decree, measures that benefit their own residents to the detriment of those in other jurisdictions (spillover effect), a situation that would not occur in the case of a centralized intervention. Such situations are plausible, but do they in fact occur often? If we exclude instances of discrimination which contravene rules ensuring the free movement of goods and production factors, and cases where costs passed on to the outside represent only a tiny fraction of the total cost, the danger may be more theoretical than real. Indeed, it is likely that a real spillover effect can only occur other than in the short term with the help of central authorities. Otherwise, it must be assumed that retaliatory measures would put an end to it.

Another argument in favour of centralized intervention is based on the idea that disparate interventions by decentralized governments lead to a fragmentation of the market and hinder the achievement of anticipated economies of scale. It must be acknowledged that the effective elimination of obstacles to free economic movement are hard to achieve without some degree of reconciliation of the legislation of participating governments. However, this does not necessarily require centralized intervention, since a simple harmonization of legislation would suffice. In addition, some degree of competition among participating governments does lead, in many cases, to increased efficiency which offsets losses attributable to the fragmentation of the market.

It has also been noted that measures respecting economic stabilization, income redistribution and employment policies can only be achieved efficiently by centralized authorities. Although this viewpoint seems accurate, we can hardly use it to justify centralizing all — or even essential — economic powers. This is all the more true since it appears that decentralized governments, being closer to their constituents, are also more likely to respond to their wishes from an economic standpoint,



i.e., to be more efficient in satisfying political choices in terms of public well-being. Consequently, once this level of economic integration has been attained, any decision to pursue centralization to a point where the economic union is supplanted by a unitary state becomes a political one and nothing more.

The farther we proceed toward economic integration, the more it seems that gains which are attainable in economic terms decrease in importance as the possible trade-offs increase. At the level of the free trade zone and the customs union, the calculation remains essentially an economic one; political integration, if it is contemplated, is a secondary consideration. With the creation of a common market, a new dimension appears; place prosperity as a preoccupation yields to people prosperity, and a minimum degree of political integration is accepted. The move to an economic union, although still allowing for a number of economic gains, leaves increasing leeway for political choices. The union will be centralized to a greater or lesser degree and participating states will have greater or less autonomy, according to what the authorities concerned decide. At this juncture, we can only note that the gains arising from greater integration give way easily to the attainment of objectives not strictly economic. In other words, the driving force of economics — the origin of any integration phenomenon — tends to be absorbed by political considerations as integration progresses. Figure 2-1 illustrates this situation.

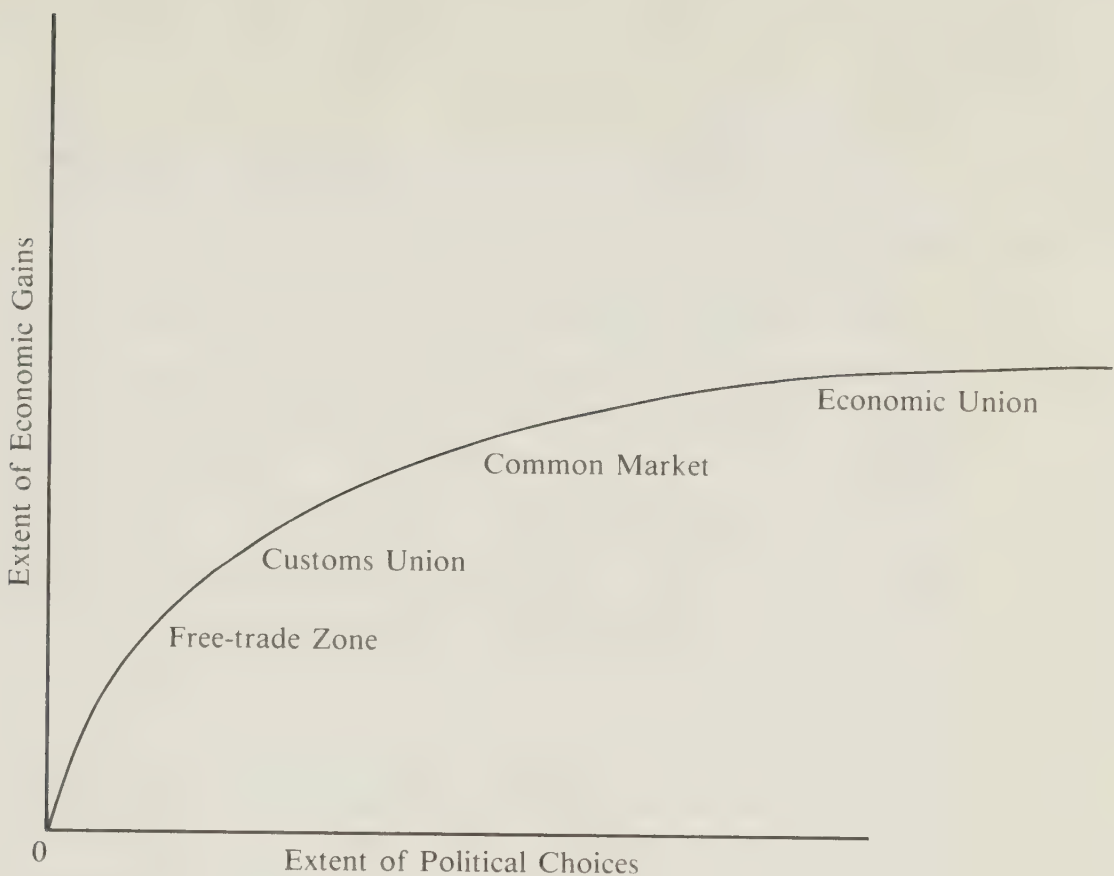
Concretely, this means that the further economic integration progresses, the better the institutional mechanisms required to achieve political consensuses must be. Otherwise, the common policies put forward will simply cause decentralized governments to introduce compensatory policies. If governments feel that their essential interests are not taken into account by central authorities, their normal reaction will be to use their own powers to protect themselves. The promised prosperity will be general or will not be achieved at all.

### *Political Significance of the Concept*

The economic union, which is essentially an economic concept, synonymous with collective benefits, is quickly revealed as the ideal instrument for promoting broader political aims. Whether at the international level, as in the case of the European Economic Community (EEC), or the national level, as in most existing federations, the close link between economic union and political integration is not a mystery.

At the end of World War II, the instigators of the movement for European integration repeatedly emphasized that, in their view, a common market was only one step toward more extensive political integration. The preamble of the Treaty of Rome mentions the wish of the signatories to work toward closer political union. Certain commentators

**FIGURE 2-1 The Relationship between Economic Gains and Political Choices in the Processes of Integration**



at the time, such as Dr. A. Hallstein, even confirmed that what is called economic fusion is in fact a political process. On the other hand, the establishment of the European Free Trade Association (EFTA) was the occasion for clear statements to the effect that the only objectives sought were economic. Indeed, at this initial phase of economic integration, the preservation of each state's sovereignty remains a major preoccupation. As soon as it is a question of a common market and economic union, however, such is no longer the case.

Although economic union may have seemed like a key lever in a strategy for launching European integration, subsequent events appear to indicate that, beyond the basic realization of the common market, that is, the free movement of goods and production factors, political considerations quickly overshadow economic advantages. It is interesting to note that the successes achieved in eliminating obstacles to trade in the EEC were balanced by a return to the rule of consensus in working out common policies, contrary to the text of the treaty, as if member states were prepared to accept the rules of the marketplace, provided they were certain that no central intervention would distort its operation. Thus, implementation of common policies has not always lived up to expectations, even when such policies essentially sought to correct market



flaws. Notwithstanding all the effort expended until now, a monetary union, for example, has yet to be achieved.

How can we assess the progress made so far? In a recent article, Jacques Van Esch, after analyzing various methods used to determine the results of economic integration, concludes that the creation of the EEC has indeed had positive economic effects. But more important still, in his view, is the fact that economic integration has fostered greater political integration, which illuminates the role that the concept of economic union can play with regard to political integration.<sup>7</sup>

The latter conclusion also applies in the case of federal states. At the origin of most of these states, we find arguments that emphasize the possible gains from the establishment of a common market or an economic union. At the same time, other, much more political, preoccupations can be noted, which underline what may be the secondary nature of an economic union vis-à-vis these objectives. Switzerland, for example, adopted a federal constitution in a context characterized by political and religious conflict. As a customs union had been adopted long before, it could only be a question of protecting it. For Germany, the creation of the Zollverein in 1815 at the instigation of Prussia acted as a fundamental mechanism in achieving the unification of the German states and their subsequent independence from Austria. The imperial constitution of 1871, the antecedent of the current constitution, was the result of a lengthy process leading to unity and independence. In the case of the United States, we know that the economic union of the states also played a vital role in relation to a broader goal, that of independence. With respect to Canada, most historians agree in recognizing that, although the Constitution of 1867 aimed at fostering the economic development of the colonies at a time when access to the U.S. and English markets for their products seemed threatened, it was also intended to ensure the survival of the British colonies in light of American expansionism and to break the increasingly apparent impasse between anglophones and francophones in the united Province of Canada.

Without claiming to develop a theory of the type that W.H. Riker<sup>8</sup> has advanced, according to which all federations grow out of a feeling of being threatened or a desire to expand, we can nonetheless note that discussions about the need for greater economic integration generally go hand in hand with the pursuit of other goals. Moreover, there is reason to question the motives that led the federal government in Canada to decree in 1979 that the consolidation of the Canadian economic union had become a constitutional priority.

Two explanations have been put forward in this regard; both are linked to the idea of a threat. The first is essentially internal and is based on the notion that the provinces, through their economic actions, are tending increasingly to fragment the Canadian economy to such an extent that the country's survival might be threatened in the medium term. The



other explanation is more closely linked to external factors. According to it, we have now entered a period of unbridled international competition; only closer economic ties among Canada's various constituent parts will enable us to face it. Of course, these explanations are not accepted unanimously. In particular, doubts have been expressed concerning the real importance in economic terms of provincial protectionism. Similarly, it is not clear that strengthening the Canadian economic union would have any appreciable impact on its ability to meet international competition. Furthermore, we can only wonder about the level of economic integration required to face these threats. Must we, as does the Treaty of Rome, more or less prohibit the provinces<sup>9</sup> from adopting any measure having an effect equivalent to quantitative restrictions? Must we concentrate more powers in the hands of the federal government? Must we simultaneously restrict the powers of the federal and provincial governments? At Canada's current level of economic integration, any change in the constitution runs great risk of taking on highly political connotations, unless it is aimed at solving a number of specific operating problems rather than achieving a new higher level of integration.

### *Legal Formulation of the Concept*

From a legal standpoint, the concept of the economic union is expressed in markedly different ways according to whether we are dealing with international or constitutional law. In the former, participating states are sovereign, and political integration is in principle less extensive. It is not surprising therefore that treaties covering economic union include highly detailed provisions concerning the elimination of obstacles to the free movement of goods and production factors, the pace of integration, common policies, central institutions and so on. In the latter, to the contrary, constitutional provisions establishing the economic union are often barely sketched out and fade into a context of more developed political integration. Indeed, these economic unions are found essentially in states with federal constitutions. What the constitution does not spell out will be clarified by the courts, intergovernmental agreements and even current practice. Whether in international or constitutional terms, we can only note the existence of a great variety of legal means able to be used in implementing an economic union.

To improve our understanding of the role of law in this respect, we will first examine the experience of three countries with a federal structure, Canada, Australia and the United States. Although we must be wary of any simplistic transposition of foreign legal mechanisms to the Canadian context, such a comparative study can enlighten us on the possible impact of hypotheses envisaged for Canada. Next we will briefly outline the lessons to be learned from the experience of economic unions based

on international treaties. In a context in which the sovereignty of the state remains always the norm, it is easier to discern the links that are established between politics, economics and law.

## **Economic Unions Based on Constitutional Law**

As we noted earlier, economic unions based on constitutional law are mainly found in states with a federal system where regional governments still wield considerable economic powers. The legal instruments underlying these unions are essentially of three kinds. First, there is the formal constitution itself which, more often than not, is seldom explicit on the question of economic union. Second, there is constitutional case law, often considerable on the question of the division of economic powers; direct references to the concept of economic union are occasionally found therein. Third, there are all manner of governmental agreements and arrangements which adapt, and in some instances even alter, the formal division of powers.

Formal constitutional provisions are the most obvious and stable of the three types of instruments; however, given the cumbersome nature of amending mechanisms, they are also the least flexible and adaptable. Constitutional case law makes it possible to mitigate in part this lack of flexibility; although it allows for a degree of adaptation, it cannot rewrite the constitution. Moreover, it is dependent upon judicial activism, which may vary appreciably from one federation to another. The greatest degree of flexibility is attained through intergovernmental arrangements, but as a recent study has emphasized, they are also the least visible and the least stable of the three mechanisms.<sup>10</sup>

## ***Canada***

### **INTRODUCTION**

In the following pages, we will examine the essential characteristics of the Canadian economic union, first, on the basis of constitutional texts, and then according to the case law that has interpreted them. Subsequently, we will briefly examine the role played by intergovernmental arrangements in relation to the basic facts outlined. The analysis will follow the progression outlined by B. Balassa, i.e., commercial integration or the free movement of goods, the integration of production factors or the free movement of persons, services and capital, and common policies or the division of economic powers.

### **FREE MOVEMENT OF GOODS**

#### ***Section 121: Statement of the Principle***

Section 121 of the *Constitution Act, 1867* stipulates that “all Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from



and after the Union, be admitted free into each of the other Provinces.” Originally, the courts had considered this statement to be aimed essentially at eliminating customs duties and other taxes of equivalent effect between the provinces.<sup>11</sup> Subsequently, it was specified that section 121 was aimed at export and import duties,<sup>12</sup> and that it bound the federal Parliament as much as the provincial legislatures. In 1958, Mr. Justice Rand proposed a broader interpretation of the same section in *Murphy v. C.P.R.*:

I take s. 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.<sup>13</sup>

However, this interpretation, which implied that the federal Parliament (like the provincial legislatures already bound by section 91(2)) could not institute non-tariff obstacles to interprovincial commerce, also included a broadening of the notion of free trade which left room for a certain degree of regulation.

This point of view was to be confirmed and further clarified in *Reference Re Agricultural Products Marketing*, when Chief Justice Bora Laskin remarked:

It seems to me, however, that the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. It must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other Provinces.

A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121.<sup>14</sup>

Thus, section 121 currently is seen as a general principle prohibiting the maintenance of tariff and non-tariff barriers between the provinces, whether such barriers are raised by Parliament or the provincial legislatures. However, this prohibition, interpreted in light of other provisions in the *Constitution Act, 1867*, is not absolute. What is prohibited, concretely, is any legislation whose true purpose is to restrict interprovincial trade for protectionist purposes. From this standpoint, there appears to be a presumption according to which Parliament, when it



legislates in the realm of economics, does so in the national interest and not with a view to dividing the national territory into distinct parts. Obviously, this presumption does not apply in the case of the provinces. As we will see later, a rather different approach prevails in Australia.

### *Section 91(2): Application of the Principle*

Despite the prohibition contained in section 121 of the Constitution, it is above all to section 91(2) — a provision attributing powers — that the courts have resorted in judging the constitutionality of provincial legislation restricting interprovincial commerce. We might well wonder what justifies such an attitude; it clearly contradicts that of Australian judges who, in a similar situation, preferred to have recourse to a prohibitive provision rather than to a provision attributing powers. Is it because section 121 was originally interpreted in a restrictive fashion? Is it because it was never really in the interest of the federal government to have the courts elaborate a broad interpretation of section 121, which would also be binding on it? Or, could it be that lawyers and jurists themselves, when confronted with situations that called into question the free movement of goods, were unable to see the potential of section 121? All three explanations seem possible.

Be that as it may, it is essentially on the basis of section 91(2) that the problem of impediments to the free movement of goods was envisaged in Canada. In 1931, in a climate favourable to the provinces, the Supreme Court of Canada declared a marketing plan established by British Columbia unconstitutional, because it instituted a large degree of control on the movement of goods destined primarily for interprovincial commerce.<sup>15</sup> More recently, in 1971, the Supreme Court in *A.-G. Man. v. Man. Egg and Poultry Assn.* pronounced itself quite unequivocally on the matter. The problem raised before the court dealt with a Manitoba egg marketing plan which applied to all eggs sold in Manitoba regardless of their source. In declaring the unconstitutionality of the plan, Mr. Justice Pigeon stated:

An essential part of this scheme, designed to obtain for Manitoba egg producers the most advantageous marketing conditions, is not merely to subject eggs brought in from outside the province to the same trade regulations as those produced therein but, in effect, to enable the Manitoba producers through the Board to restrict by means of quotas the local sale of eggs produced elsewhere to whatever extent will best serve their interests, even if this means a complete prohibition of such sale.<sup>16</sup>

However, since the *Carnation Co. v. Que. Agricultural Marketing Bd.* decision,<sup>17</sup> it has also been established that a provincial act may be valid in relation to section 91(2) even though it has repercussions on interprovincial commerce. In other words, before concluding that a provincial act is unconstitutional because it imposes quantitative restrictions or measures of equivalent effect, it is important to determine whether the

act in question is in relation to interprovincial trade, or whether it affects such trade without relating directly to it. In this respect, the courts have already recognized that the provinces could, for valid reasons not beyond their competence, set various conditions for the sale of foreign products within their territory. In 1969, for example, in *R. v. Loblaw Groceteria Co. Ltd.*, the Manitoba Court of Appeal declared that it was indubitably within provincial jurisdiction “to legislate to safeguard the health and pocketbook of its people by establishing minimum standards of grading and packaging of natural products.”<sup>18</sup>

The right to regulate intraprovincial trade has been interpreted sufficiently broadly in recent years that some see that as a potentially serious impediment to the free movement of goods, given the constantly growing number of distinct provincial laws relating to trade. Thus, following the *Labatt Breweries* and *Dominion Stores* cases,<sup>19</sup> the federal government, in a white paper entitled “Securing the Canadian Economic Union in the Constitution,” put forward the following argument:

Under existing constitutional arrangements, both orders of government have some jurisdiction over consumer and environmental protection, product standards and technical regulations. There is nothing in the *BNA Act* that enjoins governments to ensure that their measures do not have the effect of creating *unnecessary* obstacles to trade. Similarly there is nothing in the *BNA Act* calling for the “*approximation*” of laws and regulations that affect the functioning of the common market. As a result, the extent to which the technical requirements of economic mobility can be met depends upon the ambit of federal exclusive jurisdiction, or the good will and common sense of provincial authorities.<sup>20</sup>

It is only one step from there to demanding a broadening of federal jurisdiction with respect to the regulation of trade in general. Given that “all exercise of legislative authority can create barriers,”<sup>21</sup> as the federal government itself recognizes in its white paper, are we in danger of gradually rejecting federalism as a system of government in Canada? It is interesting to note, in this respect, that in *A.-G. Can. v. C.N. Tpt. Ltd.* (a Supreme Court decision handed down in December 1983), Mr. Justice Dickson, dissenting, raised the overall problem, recognizing that Parliament, under section 91(2), has the right to regulate commerce in general for Canada as a whole when “(i) the provinces jointly or severally would be constitutionally incapable of passing such an enactment and (ii) . . . failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.”<sup>22</sup> Should we see this as an open door to centralization, or an honourable compromise between the provinces’ interests and those of the country as a whole? Only time will tell.

To summarize, and to quote the terms used by Chief Justice Laskin in *Reference Re Agricultural Products Marketing*, it is obvious that “the federal trade and commerce power also operates as a brake on provincial



legislation which may seek to protect its producers or manufacturers against entry of goods from other Provinces.”<sup>23</sup> However, it does not in fact prohibit the provinces from all intervention that may affect interprovincial commerce. It goes without saying also that what the provinces are prohibited from doing under section 91(2) may with validity be done by the federal Parliament, as long as section 121 is respected. In 1971, in *Caloil v. A.-G. Can.*, the Supreme Court of Canada declared that a federal regulation prohibiting the movement and sale of oil imported west of an imaginary line crossing the centre of Ontario from north to south constituted a valid exercise of the federal power over foreign trade under section 91(2).<sup>24</sup>

By the very fact of choosing to analyze problems related to the free movement of goods in light of section 91(2) rather than section 121, Canadian courts have adopted an attitude which has undoubtedly left more room for government intervention. For some, this choice, whether intentional or accidental, may no longer seem the best one in 1984. Although it is hard to amend the Constitution with a view to broadening the scope of section 121, it is scarcely easier to alter radically the Supreme Court’s interpretation of a given question. Moreover, in certain situations the courts find themselves practically powerless.

### *Limits of the Principle*

When sections 121 and 91(2) of the Constitution are referred to as legal instruments which guarantee the free movement of goods, it must be clearly understood that what is covered is, first and foremost, the normal interventions of governments, i.e., their legislative and regulatory activity. However, that is not the only manner in which governments can restrict the free movement of goods; they can, indeed, achieve the same result by intervening directly in trade, through grants or through their purchases. This type of intervention, which depends to a much greater degree on the executive rather than the legislative power of the state, is hard to dispute before the courts. In such situations, therefore, it is not surprising that little attention is paid to the formal division of powers.

The Canadian Constitution entirely ignores grants as such. With regard to the federal government, grants must first be examined in relation to the government’s spending power, as in the approach adopted in 1936 by the Supreme Court of Canada in *In re: Employment and Social Insurance Act*. In this case, Mr. Justice Kerwin stated:

It is quite true that Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact.<sup>25</sup>



However, it must be noted that the federal government's spending power, the origin of the power to make grants, whether or not they are conditional, is not absolute. The following reservations were formulated by the Privy Council in 1937:

But assuming that the Commission has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within dominion competence.

It may still be legislation affecting the classes of subjects in s. 92 and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence.<sup>26</sup>

Up until 1984, however, no federal government subsidy program has been declared ultra vires for the reasons mentioned by the Privy Council.

Provincial spending power probably derives from section 126 of the Constitution (relative to the provinces' consolidated revenue fund), from section 92(2), which stipulates that the provinces may levy direct taxes within their boundaries, "in order to the raising of a Revenue for Provincial Purposes"; these provisions are complemented by the crown's prerogative to spend as it sees fit the sums it collects. The expression "for provincial purposes," although it initially appears to be restrictive does not in itself constitute a real limit to provincial spending power. According to Chief Justice Duff, these words simply mean "for the exclusive disposition of the legislature."<sup>27</sup> In light of jurisprudence and practice, Gérard La Forest concluded:

There seems to be no constitutional impediments, either, to prevent the provinces from encouraging, by grants, schemes falling largely within federal regulatory control in the absence of inconsistent federal legislation. Moreover, subject to overriding federal legislation, the provinces may affect the scope and direction of such schemes by making these grants subject to conditions.<sup>28</sup>

Very recently, the Saskatchewan Queen's Bench, in *Dunbar v. A.-G. Sask.*, confirmed this position by recognizing provincial power to make grants for purposes beyond their legislative competence, provided that such an exercise of spending power is not equivalent to an attempt to control or regulate a field of jurisdiction attributed to Parliament. The problem raised concerned a \$1 million grant made by the province of Saskatchewan in the form of international development aid.<sup>29</sup>

Thus, no current provision in the Constitution appears to limit in a serious way provincial power to make grants. Indeed, all the provinces subsidize in one way or another their industry and agriculture. Grants are aimed at creating new firms, developing existing ones, supporting

certain companies in sectors that are especially threatened by imports, and improving export performance. To varying degrees, we find, on the one hand, grants intended to foster the replacement of imports with local products and, on the other, grants related to exports. In such cases, however, the payment of grants is subject to numerous criteria, including, incidentally, the potential of the applicant firms for export or import substitution. Administratively, it is not a straightforward situation, a fact which undoubtedly explains why grants of this type have not been contested in the courts on the grounds they hindered the free movement of goods.

Government purchases, like grants, are considered in current international economic theory to be major obstacles to the more efficient use of productive resources. When such purchases are made on a preferential basis, which is often the case, they are equivalent in practice to a local production grant. To go further, one might argue that they amount in practice to import customs duties. The grant's importance or, to put it another way, the protection accorded local products, is relatively easy to establish; it is determined by the difference between lower prices in effect abroad and higher ones paid for local products.

In Canadian constitutional law, the problem that preferential provincial purchasing policies represent is analyzed in essentially the same manner as the question of grants. In other words, the government of a province, as a legal entity, would appear to be free to conclude contracts with whom it wishes and as it sees fit.

Unfortunately, until now, no judgment has dealt with the problem of the constitutionality of the provinces' preferential purchasing policies as such. Given their frequency, it may seem astonishing that no decision has been brought down with a view to having such policies declared unconstitutional. An important part of the reason clearly lies in the essentially administrative nature of the practices in question, which does not favour legal actions. At least in the case of Quebec, which has passed formal regulations in this regard, we might have expected a challenge based on the fact that the primary purpose of a preferential purchasing policy is to restrict the free movement of goods, contrary to what section 121 stipulates, and in clear violation of section 91(2), which attributes the regulation of interprovincial commerce to the federal Parliament. However, a victory might quickly seem illusory, in that Quebec could simply act in a covert rather than an overt manner, i.e., on a purely administrative basis. As we will see later, the Australian courts have sought to control such situations, but with mitigated success.

## FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

In his 1974 study of *Canadian Federalism and Economic Integration*, Safarian wrote: "In summary, section 121 of the *B.N.A. Act* constitu-



tionally establishes a customs union rather than the more integrated, and largely *de facto*, common market for Canada.”<sup>30</sup> Indeed, neither section 121 nor any other section of the *Constitution Act, 1867* establishes that persons, services and capital must move freely in Canada. The *Constitution Act, 1982* substantially altered this situation, however, by making the rights to live and work in each of the provinces rights recognized by the Constitution.

### *Free Movement of Persons and Services*

The *Constitution Act, 1867* contains no provisions respecting the rights to move and establish oneself as such. In the absence of any express mention, these rights have been considered in practice as fields of formal competence attached to one or the other of the fields of material competence enumerated in the Constitution. Despite an attempt to have the courts recognize the free movement of persons as a subsidiary right of Canadian citizenship and, consequently, a field that falls under federal jurisdiction rather than provincial, the situation has not changed.

Thus, unlike the European Economic community (EEC), where the rights to move and take up residency are explicitly recognized, in Canada the free movement of persons and services is analyzed in light of the attribution of competence respecting manpower and services. With regard to manpower, the fundamental principle is that this field is attached essentially to the “property and civil rights” category, which falls under provincial jurisdiction. This principle, put forward for the first time in 1925 by the Privy Council in *Toronto Elec. Cmmrs. v. Snider*, a case concerning the settlement of industrial disputes in businesses,<sup>31</sup> has been reconfirmed on numerous occasions in various cases related to working conditions in general, unemployment insurance, and so on.<sup>32</sup> In a wider sense, the courts have also deemed that the regulation of trades and professions falls under provincial jurisdiction.<sup>33</sup> The main exceptions concern employment and working conditions in works and undertakings that link the provinces or the provinces and foreign countries, such as railways and telephone systems, or in works declared to the general advantage of Canada, such as grain elevators and uranium mines, which fall under the exclusive jurisdiction of the federal Parliament.<sup>34</sup>

The situation is quite similar for services. In a series of cases related to the insurance business in particular, the courts have decided that the regulation of business in general, including services, is in principle the responsibility of the provinces, again by virtue of their competence in the realm of property and civil rights.<sup>35</sup> Once again the main exception is for interprovincial or international transportation and communications companies. More limited exception relates to companies incorporated under federal legislation, whose legal status may not be denied by provincial legislation.<sup>36</sup> Thus, for example, provincial laws requiring



such companies to obtain a permit to operate locally and to go to law, or to be able to issue capital, have been deemed unconstitutional.<sup>37</sup> In other respects such companies are subject to general provincial legislation; thus it was deemed that legislation prohibiting any issue of capital other than through a properly accredited broker was entirely constitutional.<sup>38</sup> The ability of companies incorporated under provincial legislation to act outside the province in which they are incorporated depends essentially on the laws of those other provinces (see the Privy Council's decision in *Bonanza Creek Gold Mining Co. v. R.*).<sup>39</sup> In one specific field, banks and banking operations, the federal Parliament has exclusive jurisdiction. Finally, certain federal powers may allow indirect intervention with respect to the free provision of services, for example, competence in the realm of criminal law and competence relative to interprovincial and international commerce. However, in the latter instance, the courts have limited the extent of federal jurisdiction by considering services primarily from a contractual standpoint; once a service is located in one province or another, according to the place of contract, it is hard to incorporate an interprovincial or international perspective.<sup>40</sup> Thus, the Manitoba Court of Appeal, following the reasoning of the Privy Council and the Supreme Court concerning insurance, decided in 1966 that the province's legislation respecting stocks and bonds did not infringe upon federal exclusive jurisdiction over interprovincial trade when it subjected brokers from outside the province doing business with residents of the province to its requirements.<sup>41</sup>

Before the *Constitution Act, 1982* came into force, certain attempts were made by the courts to palliate the absence in the Canadian Constitution of any statement of principle concerning the free movement of persons and services. In particular, Mr. Justice Rand, in the *Winner* decision, went so far as to confirm that "a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action."<sup>42</sup> However, this argument, which the Privy council did not consider, was definitively rejected in 1975 in the *Morgan* case.<sup>43</sup>

With the enactment of the *Constitution Act, 1982*, it may be said that Mr. Justice Rand's wish was not only achieved, but even surpassed given that the federal government is also bound by new provisions respecting mobility. The relevant section of the Charter (section 6) reads as follows:

*Mobility Rights:*

- (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially and economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

We do not intend to discuss this section in detail. Suffice it to say that section 6, in its current form, seems like a typically Canadian compromise between provincial and national interests. The free movement of persons is recognized, but in such a way that an opening is left for intervention by legislators and governments, who may, under the terms in subsection 4, impede, if not prevent, the achievement of the adjustments necessary to meet international competition.

### *Free Movement of Capital*

In the absence of a provision clearly stating the principle of free movement of capital, we must again refer to sections 91 and 92 of the Constitution to determine to what extent the provinces may restrict their movement. At first glance, several subsections appear likely to apply. In section 91, these include primarily subsections 2 (regulation of trade and commerce), 14 (currency and coinage), 15 (banking, incorporation of banks, and the issue of paper money) and 16 (savings banks). In section 92, the provision most likely to be applied is obviously subsection 13, which deals with property and civil rights in the province. Other provisions may occasionally pave the way for regulations that indirectly restrict the movement of capital, such as subsection 21 of section 91 (bankruptcy and insolvency). However, these occurrences are too isolated to discuss here.

From the preceding list, it is immediately apparent that a first type of restrictive measure is totally outside provincial jurisdiction. According to subsection 14 of section 91, only Parliament may legislate matters of currency; under subsection 15 of the same section, only Parliament may legislate with respect to the issue of paper money. Both provisions taken jointly are the basis for the Canadian economic union and exclude any possibility of the provinces' restricting the movement of capital by means of exchange control.

However, it is also possible to exercise some control over the move-



ment of capital through the financial institutions that engage in these operations. Unfortunately, the situation in this respect is not nearly as clear as it is concerning exchange control. Under subsections 15 and 16 of section 91, the federal Parliament enjoys exclusive jurisdiction over banks and savings banks. However, neither power has prevented the provinces from establishing and controlling various types of financial institutions, such as caisses populaires and credit unions, all usually qualified as quasi-banking institutions because their activities resemble in many ways those of banks. Generally, the courts appear to have deemed that, in the absence of appropriate federal regulations, the provinces could regulate such institutions by virtue of their jurisdiction over property and civil rights.<sup>44</sup> This reasoning, based on the theory of the double aspect, however, does not help clarify the limit of federal authority over banks. For the time being, all we know is that the provinces may not legislate on banking operations as such;<sup>45</sup> moreover, they may not, through a tax or any other means, restrict the status and essential powers of banks.<sup>46</sup> However, if the federal Parliament were to decide to subject quasi-banking institutions to its jurisdiction — the question has arisen frequently in recent years — a much more rigorous definition of what falls under its exclusive jurisdiction would be needed.

Aside from controlling currency, which is completely outside the scope of provincial powers, and financial institutions, which are partly federal and partly provincial responsibility, there is a third control over movement of capital which seems largely open to provincial intervention and that is the control of outside investments in the province. Since the *Morgan* decision, it has been established that the provinces may, for reasons arising out of their jurisdiction, restrict the right of non-residents to own property in their territory. To the extent that the laws of a province are “not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity,”<sup>47</sup> it appears that the provinces might also limit the right of non-residents of Canada to invest as they see fit in various sectors of the provincial economy.

## COMMON POLICIES AND THE DIVISION OF ECONOMIC POWERS

At this point, we can state that Canada thus qualifies as a common market in economic terms, despite numerous shortcomings, not only in practice but in the statement of constitutional principles governing the country's economic structure. We should now ask ourselves whether Canada constitutes a true economic union, beyond the common market, or better still (as certain authors claim), a completely unified country in economic terms. In a study published in 1977, Pierre Fréchette wrote:

On the scale of economic integration, which extends from the free trade zone to economic union, Confederation is occasionally referred to as a



common market. This is inaccurate. Canada is even more than an economic union, since the federal state's main powers, responsibilities and economic policies are completely integrated. This integration is so extensive that it is not necessary to harmonize provincial policies, since they are almost non-existent.<sup>48</sup> (translation)

However, not all support this point of view. In 1978, John C. Pattison wrote:

Canada is not a complete "common market" as there are some restrictions on the movement of capital and labour. In fact, Canada can hardly be called an "economic union" since this would imply a harmonization of policies among the provinces and the federal government that has manifestly not been achieved.<sup>49</sup>

To clarify the question, it seems necessary first to describe succinctly the division of legislative powers originally outlined in the *Constitution Act, 1867*. Then we will see how the courts have interpreted, in broad outline, that division. To conclude, we will examine the adaptation achieved in practice through executive power.

### *The Constitution Act, 1867, or the Confirmation of the Exclusivity Rule*

Under sections 91, 92 and 93 of the *Constitution Act, 1867*, the federal Parliament and provincial legislatures were granted exclusive legislative powers. Section 91 mentions the "exclusive legislative authority" of the Parliament of Canada extending to all matters coming within the classes of subjects enumerated therein; section 92 stipulates that in each province the legislature may "exclusively make laws" in relation to matters coming within the classes of subject mentioned; section 93 recognizes that "in and for each province the legislature may exclusively make laws in relation to education." In 1867, concurrent powers, as a method of distributing legislative authority, applied only to section 95, related to agriculture and immigration. This virtually absolute predominance of the exclusivity rule in the division of powers as it was conceived in 1867 was clearly recognized in the Privy Council decision respecting *Labour Agreements* (1937). In vivid language, it stated:

"While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."<sup>50</sup>

As we will see later, this rigorous conception of exclusivity in the division of powers has not been followed in later cases.

Two consequences of the exclusivity rule must be indicated immediately to the extent that they are still applicable in terms of principles. First, failure by the federal Parliament to exercise powers attributed to it

does not in any way authorize provincial legislatures to move into these areas of jurisdiction, and vice versa. This situation is markedly different from that in the United States, where the states enjoy broad powers of intervention in cases where Congress has not intervened directly or indirectly in areas under its jurisdiction. Second, neither the federal Parliament nor the legislatures may delegate their powers reciprocally; otherwise, they would be doing indirectly what the Constitution prohibits them from doing directly. In practice, however, both consequences of the exclusivity rule have been attenuated appreciably by the courts.

How can we describe the division of economic powers achieved by the *Constitution Act, 1867*? What strikes us first is the essentially economic character of the powers attributed to Parliament under section 91: public debt and property; the regulation of trade and commerce; the raising of money by any mode or system of taxation; the borrowing of money on the public credit; navigation and shipping; currency and coinage; banking, incorporation of banks, and the issue of paper money; savings banks, weights and measures; bills of exchange and promissory notes; interest; bankruptcy and insolvency; patents of invention and discovery; and copyright. In contrast, the list of provincial economic powers seems much more limited. Essentially, it includes the following areas of jurisdiction: direct taxation within the province to raise revenue for provincial purposes; borrowing of money on the sole credit of the province; management and sale of public lands belonging to the province and the timber and wool thereon; shop, saloon, tavern, auctioneer, and other licences to raise revenue for provincial, local, or municipal purposes; local works and undertakings; and the incorporation of companies with provincial objectives. Are we to interpret this division of economic powers, which at first seems clearly to favour the central government, as did Mr. Justice Laskin, who, in *A.-G. Man. v. Man. Egg and Poultry Assn.*, pointed out “one of the objects of Confederation, evidenced by the catalogue of federal powers and by s. 121, namely, to form an economic unit of the whole of Canada?”<sup>51</sup> The statement seems accurate, although it demands some clarification.

By linking section 121 to federal economic powers, Mr. Justice Laskin seems to have had in mind the essential conditions for an economic union. We know that the concept of economic union, aside from its inherent prohibition of the establishment of impediments to the free movement of goods, also assumes the implementation of common policies in a number of fields, especially with regard to currency and international trade. Although section 121 makes no reference to factors movement, it establishes quite clearly the principle of the free movement of goods. Recently, Mr. Justice Dickson, in *A.-G. Can. v. C.N. Tpt. Ltd.*, stated: “Given the free flow of trade across provincial borders guaranteed by s. 121 of the *Constitution Act, 1867*, Canada is, for economic purposes, a single huge marketplace.”<sup>52</sup> Beyond that, however, the



division of powers in 1867 clearly gave the federal Parliament exclusive jurisdiction in the fields of monetary, trade, and fisheries policies, in addition to establishing concurrent jurisdiction with federal predominance in agricultural policy. That was already more than was required to constitute an economic union. In 1867, it should be added, there was no question of policies respecting energy, communications, the economic conjuncture and industry. At the time, it was simply not anticipated that governments might be involved in such fields and to the extent that they are today.

Indeed, one might have feared that in time, the provincial power of intervention might effectively disappear, such was the extent of economic powers attributed to the federal Parliament. In 1879, in *Citizen Insurance v. Parsons*,<sup>53</sup> the Privy Council established that the maintenance of a single economic unit in Canada would not in itself lead to such consequences. Based on the Act of Union between England and Scotland, the Privy Council proposed a more restrictive interpretation of federal powers, one which enabled the provinces to assume a considerable role in the field of economic regulation, by virtue of their powers over property and civil law. At the same time, however, the Privy Council moved toward an interpretation of the division of powers more oriented toward complementarity rather than exclusivity.

### *The Legal Interpretation, or the Triumph of Complementarity*

More often than not, judicial interpretation was only able to conclude that the division of powers stipulated in the *Constitution Act, 1867* gave rise to mixed jurisdiction in most realms of government intervention. Such is the case with regard to transportation, taxation, energy, natural resources and social policies, among others. Even in the field of fisheries, where the federal Parliament's power was clear, a provincial power of intervention, relating to their power over public property, was recognized.

The jurisprudential adaptation of the division of powers to new economic realities occurred gradually through the establishment of a number of rules of interpretation and qualification. Thus, by distinguishing between the true object of a law and its possible effects, by deeming that a single matter might, from one perspective, be a federal responsibility and, from another, fall under provincial jurisdiction, and by using a criterion of demarcation like the intraprovincial or extraprovincial character of an activity, the courts have often recognized a broad zone of mixed intervention involving both levels of government. In this zone, which over time has been designated a "grey" area, we now find most of the major sectors of economic activity with the possible exception of monetary policy.

The example of banking institutions clearly illustrates the impact of judicial interpretation. Although subsections 15 and 16 of section 91 give



the federal Parliament exclusive jurisdiction over banking and savings banks, the courts, by giving the term “bank” a relative meaning, have made way for provincial intervention in the case of quasi-banking institutions, i.e., caisses populaires, credit unions, trust companies and so on. The same type of mixed intervention has appeared in social, industrial and regional development, manpower, communications, energy and natural resource policies. Consumer protection also is the responsibility of the federal Parliament and the provincial legislatures. The inevitable result of this change is that we now find a considerable number of federal and provincial programs that are not only complementary but that also overlap in some instances.<sup>54</sup> Unless such interventions prove to be clearly incompatible, the courts declare them valid in most cases.

Obviously, this does not mean that the federal Parliament and the provincial legislatures can overlook the division of powers. Over the years, numerous federal and provincial laws have been declared unconstitutional. In fact, what the courts appear to have attempted to foster is a balancing of the powers of intervention and healthy competition between the federal and provincial governments. In a number of specific cases, where neither the federal nor the provincial governments seemed able to solve a problem satisfactorily, the courts proposed in no uncertain terms harmonization as a means of settling the matter.<sup>55</sup> However, it is not easy to harmonize the legislation of Parliament and the legislatures, especially when the real extent of powers is poorly defined and each government feels authorized to intervene. Moreover, to avoid costly disputes, governments have tended to resort to executive rather than legislative power as a means of circumventing constraints inherent in the division of powers.

### *Executive Federalism, or the Advantages and Disadvantages of Ambiguity*

Although judicial interpretation has established that the division of executive powers corresponds in principle to that of legislative powers,<sup>56</sup> it must be recognized that over time executive power has been used to circumvent, at least partially, the division of legislative jurisdictions. Having recourse to the spending power and to intergovernmental arrangements symbolizes this change in the dynamics of federal-provincial relations. More particularly, the consequences of this evolution appear considerable with respect to the economic union.

The spending power derives, among other sources, from the crown's executive power (federal or provincial) to spend as it pleases money collected under legislative powers attributed to Parliament or the legislatures.<sup>57</sup> These funds may be used in various ways, either to remunerate persons, purchase goods or services, or to make unconditional gifts, or gifts subject to conditions generally defined by an agreement, act or regulation. In the latter instance, the undertaking of an expenditure

supposes some form of contractual relationship linking the exercise of the spending power to an administrative action. Regardless of how the spending power is exercised, it does not easily lend itself to a constitutional challenge, since it presupposes that the beneficiary acquiesced more or less freely depending on the attendant conditions.

Under the circumstances, it is not surprising that this power has been used frequently by the federal and provincial governments, for purposes which may appear unconstitutional from the standpoint of legislative powers. For example, the provinces have used their spending power to establish departments whose primary role relates to international trade, or to make grants respecting exports or to replace imports with local products. The federal government, exercising its spending power, has moved into the fields of education, health, urban affairs and so on. The extent of expenditure in spheres of competence that, at first glance, seem beyond the scope of the governments concerned is far from negligible. In the case of the federal government, a simple estimate suggests that nearly 20 percent of its budget is allocated to programs not directly under its jurisdiction.

As we noted earlier, the constitutionality of these practices has not yet been settled by the courts. Various authors have diverging views on the matter; their reasoning in this respect appears ultimately to emerge from their own conception of Canadian federalism. The position of Peter Hogg is interesting in this respect:

It seems to me that the better view of the law is that the federal Parliament may spend or lend its fund to any government, or institution, or individual it chooses; and that it may attach to any grant or loan any conditions it chooses, including conditions it could not directly legislate. . . . There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because in those functions the government is not purporting to exercise any peculiarly governmental authority over its subjects.<sup>58</sup>

In other words, when a government does not act in an authoritarian manner, through legislation or regulations, it can overlook the division of powers. To say the least, this is a rather extreme adaptation of the original conception of federalism based on exclusivity.

It is interesting to note that this type of reasoning has also been applied to government contracts for a long time. Occasionally, contracts include conditions that clearly overstep the competence of the signatory government. In 1900, in *Smylie v. R.*, the Ontario Court of Appeal decided that, as a condition for obtaining a timber-cutting permit, the province could legitimately demand that the wood cut be processed in the province, in itself a regulation of interprovincial trade.<sup>59</sup> Since then, various provincial acts have been passed which include such conditions.<sup>60</sup> Similarly, the federal government imposes working conditions through its con-



tracts that frequently diverge from those prevailing in the provinces. Thus, it accomplishes indirectly what it could not achieve directly.<sup>61</sup>

According to Kenneth Wiltshire, intergovernmental agreements, which are closely linked to the exercise of spending power in many instances and are used particularly in the fields of education, health, housing, labour, social security and regional development, constitute one of the most important elements in the transformation of federalism in Canada and in Australia.<sup>62</sup> Wiltshire adds that these agreements are conceived by the executive, far from public scrutiny, and are implemented for limited periods according to methods that shield them from analysis and debate in municipal, provincial and regional assemblies. With respect to their reason for being, the author writes:

Intergovernmental agreements come into being for a number of reasons, but mainly because the coordinate, or layer-cake federalism envisaged by the Canadian and Australian founding fathers can no longer exist despite their attempt to lay down specific powers for each level of government.<sup>63</sup>

This explanation is not entirely satisfactory, however, and it may lead us astray. It is not the division of powers itself that causes problems and explains the existence of intergovernmental agreements, but the imbalance between the responsibilities of various governments and their financial power. This imbalance exists between the provinces, whose sources of revenue differ considerably, and between the federal and provincial governments. Insofar as the provinces are unable to offer the same services across the country (the mobility that is supposed to result from economic union is in reality only imperfectly attained), the federal government with its greater revenues is inevitably led to intervene in provincial fields of competence to ensure minimum national standards. The best way to ensure these standards is, of course, to employ the spending power in the framework of intergovernmental agreements.

However, such agreements create serious problems. First, it is difficult to claim that the provinces actually agree to them in all cases; indeed, if they withhold consent, they risk incurring substantial shortfalls. The programs the federal government proposes frequently do not coincide with provincial priorities; the latter have no choice but to modify their priorities. Once reached, the agreements raise a number of questions about their legal nature. To which type of law are they subject? Can they be amended unilaterally? Is there a court qualified to judge their validity? Regardless of how we answer these questions, the fact remains that such agreements have in the past been abrogated unilaterally by the federal government; the provinces have not been able to dispute the matter, despite disagreement.

In spite of these problems, it must be recognized that intergovernmental agreements have in several instances made it possible to solve satisfactorily complex problems regarding federal-provincial relations in the



economic sphere. Examples might be the 1982 agreement with Nova Scotia concerning its offshore oil resources, or the 1981 agreement with Alberta over the division of profits from the exploitation of the province's oil resources. It must be emphasized that the objective in the latter was not to circumvent the division of powers, but to harmonize federal and provincial policies in a field where each government's responsibilities were clearly delineated.

### *Harmonization of Legislation*

We should also mention the problem of coordinating or harmonizing provincial legislation as a mechanism for economic integration. In Canada, no constitutional authority is specifically responsible for promoting or imposing a degree of legislative harmonization. At best, section 94 of the *Constitution Act, 1867* confirms the right of Parliament to adopt measures it deems necessary to ensure the uniformity of provincial laws, provided that such measures only come into force in a province once they have been adopted and enacted in the legislature. Until now, this constitutional provision has never been acted upon.<sup>64</sup>

To fill this gap, in 1918 the provinces created a voluntary participation agency, the Uniform Law Conference of Canada (which the federal government and the territories subsequently joined), to foster better coordination of laws in a number of fields.<sup>65</sup> By 1983, the conference had written some 67 model legislative texts covering a wide array of subjects, although, more often than not, the provinces have hesitated to incorporate these projects into their own legislation. Indeed, until now they have adopted only one of the models proposed.<sup>66</sup> This phenomenon can probably be explained by the limited financial resources available to the conference, and the limited expertise upon which it relies. More fundamentally, however, the conference's modest success can be attributed to the absence of a firm commitment by provincial governments to harmonize legislation. Several provinces, by emphasizing their own law reform commissions, have paved the way for solutions that may differ considerably from one province to another.<sup>67</sup>

Nonetheless, a number of achievements must be noted in several sectors. With respect to securities,<sup>68</sup> the degree of interprovincial coordination has increased markedly over the past 20 years. Despite different requirements in provincial laws respecting the disclosure of information, provincial securities commissions have attained a high degree of coordination, thereby substantially reducing costs incurred by those who must comply with the commissions' legal requirements. The same applies to insurance,<sup>69</sup> where close coordination between provincial governments and the industry has made possible the attainment of near uniformity throughout the country.<sup>70</sup> Generally, however, it must be recognized that unification, or even the simple harmonization of laws in Canada, has not progressed significantly — to the great regret of pro-

ducers and merchants, who often perceive the proliferation of laws as impeding the free movement of goods and services.

## CONCLUSION

Unlike what is often said, the Constitution of Canada clearly expresses the essence of the characteristics of an economic union. The Constitution expressly provides for the elimination of customs duties and other measures with equivalent effect between the provinces, the institution of a common tariff falling under the federal Parliament's jurisdiction, and the free movement of persons. Although no constitutional principle specifically ensures the free movement of capital, such movement is in essence an established fact because of the exclusive authority the federal Parliament exercises over currency and banks. The enumeration of federal powers in the economic sphere — including interprovincial and international trade, fisheries, agriculture, competition, bankruptcy, bills of exchange, interest, patents, sea and air transportation, and land transportation crossing provincial boundaries — makes Canada more than a simple common market.

To the extent that the functioning of the Canadian economic union raises problems, the blame for that can hardly rest on the constitutional texts themselves. Blame should fall on the legal interpretation of these texts if anywhere. The two provisions most often criticized from this standpoint are sections 121 and 91(2). As we saw earlier, section 121 has in recent years been given a broader interpretation than we have been traditionally led to believe. If this section has not played a more useful role until now, it is because it has not often been invoked, for two reasons. First, until recently, Canadian lawyers, little aware of economic integration theory, were not inclined to use section 121 to promote the interests of their clients, preferring to rely upon section 91(2), which was much more familiar in constitutional terms. Contrary to what occurred in Australia, it is through a provision attributing competence, rather than the more direct prohibitive one, that problems of free movement have been broached. Second, when federal authorities have intervened in questions of this nature, they have constantly emphasized recourse to section 91(2), which favours an extension of their power, rather than section 121, likely to be interpreted as applying to both Parliament and the provincial legislatures.

In any case, the result is that it is essentially through section 91(2) that problems of free movement have been approached in Canada. Following the lead of A. Smith,<sup>71</sup> many constitutional experts have agreed in recent years that the interpretation of this provision leaves something to be desired. Two problems must be distinguished. First, section 91(2), as interpreted, appears to allow the provinces too much latitude to impede the free movement of goods. It is a fact that the traditional distinction in Canadian constitutional law between the object and the effect allows



such intervention: provincial legislation that is not aimed at interprovincial trade but that affects it in an indirect way will be deemed valid. This approach is markedly different from that which prevails in the European Economic community (EEC), where the effect rather than the object is taken into consideration. In 1974, the EEC Court of Justice ruled that “any trade regulation of member States likely to directly or indirectly, currently or potentially impede intracommunity trade is to be considered as a measure of effect equivalent to quantitative restrictions.”<sup>72</sup> The effect of state laws is also taken into consideration in the United States, but in such a way that a regulation will be deemed invalid only if its effects on interstate trade are greater than the presumed local advantages or when less-restrictive means might have been used to achieve the same end. In both instances, the method of analysis differs from that used in Canada, in that it leaves greater latitude for the interpretation of facts from an economic viewpoint. In Australia, our distinction between “object” and “effect” occurs frequently. As for the results, it appears that in economic unions based on international law, where member states preserve their sovereignty, prohibitive provisions are interpreted in a much stricter fashion than in federations, where an attempt is made to preserve the member states’ room to manoeuvre.

The second type of criticism raised by the interpretation of section 91(2) concerns the possibility that it has unduly restricted Parliament’s powers in the realm of trade. It is emphasized, in particular, that the second branch of the *Parsons* decision,<sup>73</sup> dealing with federal competence respecting the regulation of trade in general, never found favour before the courts. A lack of harmonization of economic legislation would have resulted from it; Canada would now be a largely fragmented economic territory. This criticism presupposes that harmonization is valid in itself and that it can only be attained efficiently under the aegis of the federal Parliament. Neither statement is wholly acceptable. For certain economists, competition between the provinces in terms of legislation may be preferable to forced harmonization. It is not certain that provincial legislation cannot be harmonized voluntarily; such harmonization seems to have progressed significantly in the fields of insurance and securities, for example.

With respect to the division of powers, defining the fields of common (central) policies and decentralized (provincial) ones, it appears at present increasingly based on an implicit principle of complementarity rather than on the original principle of exclusivity. This change is due above all to the fact that governments are also resorting more and more to interventions that fall under executive rather than legislative power, such as spending power and intergovernmental agreements. The transformation of the exercise of powers has engendered a harmonization from above of federal and provincial interventions in certain sectors — health is one example — although, at the same time, it has led to the



duplication of government initiatives in almost all sectors. Ultimately, what has been gained in flexibility appears to have been achieved at the cost of a dilution of responsibilities toward citizens and in exchange for greater insecurity among governments. In this respect, the harmonization of federal and provincial policies is still a problem in Canada.

## *Australia*

### INTRODUCTION

The characteristics of the economic union in the Australian federal state emerge from the division of legislative powers, as well as from restrictive provisions in the Australian Constitution which are enforceable against the commonwealth and the states, and the implementation of various mechanisms for intergovernmental cooperation.

As in Canada, the Australian federation was established under the Crown of the United Kingdom of Great Britain and Ireland and is of a British parliamentary type of democracy. The written constitutions of both countries include a rigid amending procedure and, either formally or implicitly, mechanisms for resolving jurisdictional conflicts. Although the Canadian Constitution formally divides legislative powers between the federal Parliament (mainly section 91) and the legislatures (mainly section 92), the Australian Constitution, drawing on the American model, expressly enumerates only the Commonwealth's powers (mainly sections 51 and 52), leaving residual power to the states through a simple statement of principle (section 107). Moreover, in Canada, the federal government controls the appointment of Supreme Court justices, judges in other federal courts, and those in superior, district and county courts in each province. In Australia, members of all state courts are appointed by the state governors on the advice of the states. In addition, the governor general of Canada may, theoretically, disallow any legislation adopted by provincial legislatures, a provision that has no equivalent in Australian constitutional law.<sup>74</sup>

The Australian Senate differs considerably from Canada's in that it constitutes in principle a forum which not only allows regional interests to be represented and defended, but enables the states to participate in the exercise of federal powers. The High Court of Australia has qualified the Senate (the members of which are elected through universal suffrage) as " . . . co-equal with the House of Representatives . . ." and enjoying " . . . equal power with the House . . .".<sup>75</sup> However, the principle of ministerial responsibility that is inherent in British parliamentary regimes has led the Australian Senate to act in a partisan political way, like the House of Representatives, rather than as a true chamber of states. Party loyalty has overshadowed faithfulness to the states; the election of senators only reflects a choice between opposing parties.<sup>76</sup>

The Australian Constitution does not contain a charter of rights and freedoms like the one incorporated into the Canadian Constitution in 1982; in this respect, the Canadian and U.S. constitutions are similar. The formal texts of the Canadian and Australian constitutions suggest a more marked centralization of powers in Canada than in Australia; however, jurisprudence in both cases has somehow caused a reversal of these expectations.<sup>77</sup>

During the first two decades of the interpretation of the Australian Constitution, the High Court endeavoured to delineate clearly the commonwealth's and the states' powers by adhering to the principle of constitutional immunity for the operations or institutions related to each order of government, and by insisting on a highly restrictive interpretation of the scope of the commonwealth's powers in favour of a broad interpretation of the states' residual powers. However, in 1920, in the *Engineers* case, the High Court broke with tradition and took a fundamentally liberal approach with respect to the commonwealth's powers, i.e., one favourable to broadening the federal government's power of intervention in the country's economic affairs. The High Court's attitude has been consistent since then.<sup>78</sup>

### *Free Movement of Goods and Capital*

The Australian Constitution contains formal stipulations intended to counteract discriminatory or preferential practices and ensure the free movement of goods and production factors.

Section 99 and subsections (ii) and (iii) of section 51 clearly express the desire of the fathers of the Australian federation to develop a national economy by eliminating, among other things, impediments to trade and commerce and by fostering fairness among the states.<sup>79</sup> Section 99 stipulates: "The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof." This section binds the commonwealth, i.e., the Parliament and the federal government, and covers not only taxation but any measure aimed at collecting revenue, such as telephone or postal charges. Although this provision has at times hindered the commonwealth's attempts at helping states in difficulty, it is no longer a significant constraint since it cannot impede the federal power to make grants under section 96.<sup>80</sup> For a trade preference to be quashed under section 99, it must be tangible, concrete and related to a commercial transaction. Moreover, a uniform standard imposed by a federal act remains valid even though in practice its effects vary from one place to another.<sup>81</sup>

Subsection (ii) of section 51 confers on the commonwealth the power to collect taxes, "but so as not to discriminate between States or parts of States." Unlike section 99, which covers any source of revenue, subsection (ii) only covers discriminatory tax treatments exacted pursuant to



an enabling legislation.<sup>82</sup> For a fiscal measure passed by Parliament to be invalidated, it must be shown that it discriminates on a territorial basis — that prohibition does not prevent Parliament from designing its tax system according to various commercial activities or categories of goods — or that it fosters the appearance of inequalities among the states.<sup>83</sup> In addition, subsection (iii) of section 51 specifies that the federal Parliament may legislate with respect to “bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth.”<sup>84</sup> The most controversial protective provision of the Australian common market is found in section 92 of the constitution: “On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.” Despite its apparently limpid style, this provision has had a turbulent doctrinal and judicial history, fuelled by the muted confrontation between the free trade and *laissez-faire* philosophies, by the erection of a formalist and theoretical interpretation model, undermined by its own contradictions, and by the shifting majority on the benches of the High Court of Australia called upon to delineate its contours and parameters over the years.

Historically, the insertion of section 92 expresses the insistence of the fathers of the Australian federation on countering latent protectionism, which was likely to hinder the establishment and maintenance of an Australian common market.<sup>85</sup> The courts, however, have refused to limit the section’s scope to the precepts of free trade alone by indicating their support, qualified to a greater or lesser extent depending on the period, for promoting and protecting individual economic rights.

### *The Approach of the McArthur Decision*

The first striking interpretation of section 92 was set out by the High Court of Australia in 1920, in the *W&A McArthur Ltd. v. Queensland* decision,<sup>86</sup> when it stated that an act of the State of Queensland establishing ceiling prices for products could not be opposed to sales contracts whose terms provided for interstate movement of products. This approach, centred on determining the subject matter of the case, emphasized using the protection of section 92 (with regard to aspects of commerce and interstate trade), against state measures deemed to relate in essence to currency and trade. Thus, a commercial transaction which in itself was intrastate could nonetheless be subjected to section 92 because of close links with an interstate commercial transaction. But the protection of section 92 could not be applied to economic measures that by their very nature did not fall under the heading “trade and commerce.”<sup>87</sup> Moreover, the majority judgment concluded that section 92 guaranteed individual freedom to carry on interstate commerce. In this context, “free” meant free from any government control. However,



although the High Court obviously based its decision on the *laissez-faire* philosophy, it minimized the potentially dramatic scope of its undertaking by exempting the commonwealth from the rigours of section 92.<sup>88</sup>

The *McArthur* decision was soon to be emasculated by a series of legal decisions which qualified it or restricted its scope.<sup>89</sup> In *R. v. Vizzard*, the majority of justices in the High Court sided with Mr. Justice Evatt in approving the validity of state road permit schemes aimed explicitly at reducing competition between trucking and the railways. For Evatt, the fact that a trucking firm was refused the right to transport goods from one state to another should not be at the heart of the court's preoccupations. Instead, the courts should examine the general character of the contested law and only declare it invalid when it restricted the overall stream of interstate commerce, i.e., when it was hostile to it.<sup>90</sup> In the same vein, the Privy Council, in *James v. Commonwealth*, partly reversed the *McArthur* decision by confirming the applicability of section 92 to the commonwealth,<sup>91</sup> a decision which, a decade later, enabled the High Court to quash an attempt by the commonwealth to monopolize interstate air transportation, through a national public corporation by claiming that the remunerated transportation of goods and persons constituted a commercial activity.<sup>92</sup> The *James v. Commonwealth* decision also provided the first indication of a new approach, which the Privy Council subsequently touched upon in the *Banks* case, whereby distinguishing between the regulation of a commercial activity and its prohibition was to serve as a basic test for deciding the validity of federal and state legislation.<sup>93</sup> Uncertainty persisted with regard to the Privy Council's fundamental orientation on the question of section 92's free trade or individualist foundations.<sup>94</sup>

In the late 1930s, however, the High Court of Australia drew closer to Evatt's position, defending a free trade interpretation of section 92. Indeed, the majority of High Court justices were primarily interested in the object, i.e., the ultimate result of the law or administrative measure on interstate commerce. In cases where commerce between the states was the object of discrimination, the legislative or administrative measure was struck down immediately.<sup>95</sup> However, the predominance of the Evatt doctrine was to dissolve in the face of a resurgence of the individualist approach to section 92.

### *The Banks Case:*

#### *The Revival and Sanctioning of the Theory of Individual Right*

The *McArthur* decision had paved the way for integrating the *laissez-faire* philosophy to the interpretation of section 92 by proclaiming the individual's freedom to carry on interstate commerce entirely free from state government control. As we emphasized earlier, subsequent High Court of Australia judicial interpretation somewhat retreated from this position, by rallying, from time to time and more or less cohesively, behind

the free trade position advocated by Mr. Justice Evatt. Faced with these doctrinal wrenches, the Privy Council in its landmark decision, *Commonwealth v. Bank of New South Wales*, reformulated its conception of section 92. The new approach was firmly based on the recognition of the economic rights of the individual, who could exercise them against the states and against the commonwealth.<sup>96</sup> In this particular instance, a law enacted by the commonwealth, creating a public banking monopoly (through the elimination of private banking and the creation of a national bank) was deemed incompatible with the prescriptions of section 92. Briefly, the *Banks* decision confirmed (a) the applicability of section 92 to the commonwealth and the states; (b) the rejection of the theory according to which this section covers only customs duties and similar fiscal impediments; (c) the high priority accorded economic rights of the individual rather than the overall flow of interstate trade; and (d) the principle that the presence of discrimination is not a requisite condition for recognizing a violation of section 92.

Unlike the free trade approach — which dwells above all on an analysis of the object, the ultimate result, or the effects of legislation or administrative measures on the general stream of trade — the individualist approach, recognizing the primacy of the rights of the individual, takes as its starting point the merchant in his specific character and the necessity of protecting his right to carry on interstate commerce free from possible government impediments. However, unlike the doctrine enunciated in the *McArthur* decision, which stated that only the states were bound by section 92, the Privy Council reaffirmed that the commonwealth was also bound by it. It took great care in demarcating the limits of the individual's rights by specifying that only legislative provisions or administrative acts that had simultaneously a "direct" effect on interstate commerce and could not be qualified as admissible regulatory measures were invalid:

But it seems that two general propositions may be accepted: (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom and (2) that s. 92 is violated only when a legislative or executive Act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law.<sup>97</sup>

In this respect, the Lords of the Privy Council thought it appropriate to emphasize that the prohibition of a commercial activity might also constitute in specific cases a form of regulation acceptable to the courts.<sup>98</sup>



At this juncture, we can hardly avoid mentioning that the Privy Council's reaffirmation of the individual's right to carry on commerce occurred at the very same time the Supreme Court of the United States was, to the contrary, extricating itself from an examination of the federal government's economic interventions by abandoning the notion of substantive due process applicable to the state and federal governments, and by concomitantly expanding the economic powers of Congress according to an exceedingly liberal interpretation of the commerce clause.<sup>99</sup>

The Privy Council was to reconfirm the point of view developed in the *Banks* decision five years later, in *Hughes and Vale Pty. Ltd. v. New South Wales No. 1*, by quashing a state system requiring commercial vehicle permits, issued at the absolute discretion of an administrative commission. At the same time, the Privy Council clearly stated that the evaluation of a law or an administrative act should be limited to their legal effects rather than taking into account their socio-economic effects.<sup>100</sup>

Subsequent changes in judicial interpretation, which followed the *Banks* and *Hughes and Vale (No. 1)* decisions, took into account the firm tone of the Privy Council insofar as they did not question the fundamental principle of the individual's right to carry on commerce, but led to bitter arguments on the application of the two assessment criteria proposed by the Privy Council, i.e., the "direct" character of a regulation and its admissible nature.

### *Justice Dixon's Approach to "Directness" and "Regulation," or the Triumphs and Tribulations of Legal Conceptualism*

The *Banks* and *Hughes and Vale (No. 1)* decisions were built upon the dissenting position adopted previously by Mr. Justice Owen Dixon of the High Court of Australia. In the earlier *Gilpin* decision, the latter had maintained that section 92 was aimed at eliminating impediments to the accomplishment of an act which in itself constituted an act respecting "trade, commerce or intercourse among the states" or which supposed interstate movement. Consequently, a given act was to be free of any restriction imposed by reference to its impact on interstate commerce, or by reference to the interstate movement implicit in it.<sup>101</sup> Although both approaches are strongly coloured by conceptualism, the Privy Council's differs from that taken by Dixon in the *Gilpin* case, in that the Privy Council specifies the necessity of demonstrating the directness of the limit imposed on interstate commerce in order to invoke legitimately the defence of section 92. During the 1950s, this additional condition led the High Court of Australia, under the leadership of Dixon, to forge ahead in refining the concept of directness and its corollary, "interstateness," while somewhat neglecting quasi-political considerations attached to the notion of admissible regulation. Indeed, prior to the delivery of the Privy Council's judgment in the *Banks* case, Dixon J. had



already indicated his refusal to import the U.S. technique of assessing the balance of interests between the states and the commonwealth as well as that other approach which consisted of taking into account the economic policies underlying measures passed by either order of government.<sup>102</sup>

The minority Dixon approach in the 1930s attempted to determine the subject matter, i.e., the subject of legislative or executive measures as opposed to their object, as a criterion of their validity in light of section 92. It was close to the theory, supported by the *McArthur* decision, according to which all state laws relating to interstate “commerce” violate section 92. On the other hand, the majority theory of the 1950s reflects the following point of view: *only* administrative acts or legislative measures directly related to interstate “commerce” may trigger the protection of section 92 to the extent that they do not constitute an admissible regulation.<sup>103</sup>

The Dixon approach in the 1950s involved analyzing the effects of constraints imposed on a plaintiff with respect to interstate commercial activities and qualifying as a “direct” burden those which employed one or more aspects of his interstate trade as an operational criterion. On the other hand, a measure restricting an individual’s freedom to engage in commerce unrelated to that person’s interstate commerce did not set in motion the protective mechanism of section 92, even though its economic impact could be substantial, since its legal effects were deemed “indirect.”<sup>104</sup> A state law requiring the possession of a permit prior to engaging in the insurance trade was deemed valid because this condition only “indirectly” affected the activities of insurers;<sup>105</sup> a state law setting the selling price of potatoes within the state (including that of potatoes imported from another state) was also deemed valid,<sup>106</sup> as was a law in the State of New South Wales setting margarine production quotas.<sup>107</sup>

The High Court further reduced the potential scope of section 92 by exempting from its application events “prior” and “subsequent” to interstate commerce in itself. Thus, a condition of a state animal skin marketing scheme, stipulating the mandatory appropriation of the skins when they were assessed, with the provision that those destined for markets outside the state would not be subject to this requirement provided the merchant in question expressly stated his intention to ship the skins outside the state within 28 days of possession, was deemed valid, as section 92 only protects certain types of transactions and not the property itself. Similarly, under the Dixon court, controls on the selling price of products (including imported ones) imposed by the states within their respective boundaries were generally deemed valid,<sup>108</sup> as were health and sanitary control measures on importing. An act of the State of South Australia prohibiting the sale in the Adelaide region of meat cut outside the region, unless it had first been inspected, and prohibiting the shipment of meat to this region without a permit, was

deemed valid and applicable to merchants importing meat from adjacent states since, according to the High Court, only local transactions were involved given that no contractual provision expressly mentioned that the plaintiff's supplies came from a neighbouring state.<sup>109</sup> In the same vein, the High Court maintained the applicability of a maximum rate, determined by the State of New South Wales, applicable by an agent to commissions collected for the sale of apples purchased from a producer in the State of Tasmania.<sup>110</sup>

The Dixon theory became even more complicated following the High Court's decision in *Hughes and Vale Pty. Ltd. v. New South Wales (No. 2)*.<sup>111</sup> The court refined its analysis by distinguishing certain circumstances which were not to be considered an integral part of interstate commerce, such as hours of movement, the safety equipment required in the transport of goods, the height and width of authorized vehicles, and the keeping of registers.<sup>112</sup> The priority thus accorded to individual freedom over macroeconomic considerations produced strange results (particularly in the field of transportation) in looking at the "interstate" character of a given act, because the centre of interest was occasionally focussed not on the movement of goods, but on the litigant's status.<sup>113</sup> Moreover, it should be noted that, despite the High Court's willingness to limit itself to legal considerations alone in assessing the direct nature of the burden imposed on interstate trade, it could not at times avoid overstepping the boundary by introducing practical considerations to its analysis.<sup>114</sup>

During the 1950s, the second branch of the "test" developed by the Privy Council in the *Banks* case, that of admissible "regulation," was not the object of such pronounced theorization as that of directness, although it was indeed raised, particularly with regard to the control of discretionary executive measures.<sup>115</sup> In the *Vizzard* case, at a time when the application of the *McArthur* doctrine was at its peak, a majority of High Court justices had approved a state program establishing a system of mandatory permits; such permits were issued only at the discretion of an administrative commission set up for this purpose, despite the fact that the specific reason for this control was to govern competition between road and rail transportation.<sup>116</sup> In the wake of the *Banks* case, the Privy Council was subsequently to abandon this approach, concluding that absolute administrative discretion did not constitute an admissible regulation under section 92 of the Constitution.<sup>117</sup> As a result of this change of course, the Australian states modified their standards. The State of New South Wales adopted formal guidelines for the administrators responsible for applying the system, although they included so much discretion that the High Court refused to ratify them.<sup>118</sup> Without stating precise criteria, the court indicated its strong reservations about norms whose scope depended upon administrative opinion.<sup>119</sup> A number of subsequent decisions, over which Dixon and Barwick had



presided successively, contested various administrative and discretionary controls. The High Court of Australia seemed intransigent about norms that required an interstate commercial activity to be justified by a permit issued entirely at the discretion (or its equivalent) of a designated administrator. On the other hand, in cases where exercising discretion was limited to a simple question of fact and was, whatever the circumstances, subject to judicial review, the court showed itself to be more conciliatory.<sup>120</sup>

*From the Demise of the Dixon Doctrine  
to the Fleeting Emergence of Chief Justice Barwick's Thinking  
and Thence to Several Schools of Thought*

The 1960s, marked by the departure of Chief Justice Dixon, spawned new doctrinal confrontations as a result of the growing opposition between Chief Justice Barwick's *laissez-faire* philosophy and pragmatism, and Mr. Justice Kitto's maintenance of Dixonian thought.<sup>121</sup> The majority of High Court justices (applying the Dixon doctrine) refused the protection of section 92 to a company in the State of New South Wales which solicited customers in South Australia by mail in breach of the latter's regulations. The bonuses offered in advertising were considered as a commercial operation separate from the "interstate" operation the actual sale would have constituted. Mr. Justice Barwick (dissenting) disputed the validity of his predecessor's formalistic and legalistic approach by emphasizing the need to take into account the economic and practical effects of legislation or administrative acts challenged under section 92.<sup>122</sup> Continuing on its own responsibility, the majority of High Court justices, led by Mr. Justice Kitto, confirmed the applicability to an interstate carrier of a law of this state which imposed charges based on the amount collected. The majority based its decision solely on an examination of legal effects in its analysis of the "interstate" or non-interstate character of the collection of sums of money.<sup>123</sup>

Divergences between supporters of Mr. Justice Dixon's thesis and of Mr. Justice Barwick's new formulation created confusion in the High Court, as subsequent decisions indicate.<sup>124</sup> The break with the Dixonian tradition actually occurred in *North Eastern Dairy Co. Ltd. v. Dairy Industry Authority (New South Wales)*, when a majority of justices agreed with Mr. Justice Barwick's position in declaring that sales of a Victoria producer's milk in the State of New South Wales, directly or through his agents, were an integral part of "interstate commerce" and came under the protection of section 92.<sup>125</sup> Several years later, in *Permewan Wright Consolidated Pty. v. Trehwitt*, the High Court unanimously amplified its withdrawal of support for the Dixon doctrine with respect to the qualification of sales of goods imported in a state by recognizing that such sales had the character of "interstate" commerce, or were closely linked to it.



Briefly, it appears that the first sale which follows the importing of goods from another state is an integral part of interstate commerce and that a restriction imposed on such trade will be deemed to affect it “directly.”<sup>126</sup>

The Dixonian doctrine of interstateness and directness was not attacked on all fronts. The principle established in the *Grannal* decision, that activities preceding interstate commerce (including the production of goods) were not part of commerce between states, weathered the storm and was systematically reaffirmed by subsequent jurisprudence.<sup>127</sup> Moreover, characteristics of the conceptualists of the Dixon doctrine resurfaced periodically in judicial interpretation, thus indicating the ongoing attraction it exercises.<sup>128</sup>

As for the concept of “regulation” adopted by Mr. Justice Barwick, it was aimed at supporting the business community (rather than the public interest in the broad sense) in pursuing accommodations or the arbitration of various parties’ rights and obligations, such that each one was free in its interstate trade operations.<sup>129</sup> This approach failed to gain a majority of the High Court justices. To the contrary, despite a diversity of opinions, the majority preferred to embark upon a process of assessing the balance of interests. The High Court weighed the relevance of control standards established by the states respecting the salubrity of agricultural products marketed within their boundaries in light of the national interest, which consisted of ensuring the free movement of goods. Thus, in *North Eastern Dairy*, the court determined that the disputed milk marketing system was justified not only by the wish to protect public health, but also by the protectionist desire to stabilize local producers’ incomes by prohibiting non-pasteurized milk supplies from other states access to the State of New South Wales. On the other hand, in *Permean Wright*, the obligation for all egg producers to have their eggs inspected and labelled by the state marketing board in order to be sold there was deemed “regulatory” since these requirements did not, in practice, threaten the interstate egg trade.<sup>130</sup>

The relative complexity and fragility of the restrictive nature of High Court judgments with regard to the validity of state monopolies ensuring the marketing of a product are clearly apparent in the *Clark King and Co. Pty. Ltd. v. Australian Wheat Board* decision. In this case, two justices (Mason and Jacobs) confirmed the validity of a national wheat stabilization program administered by a state monopoly since, in their view, this was the only practical, reasonable way to “regulate” this activity. A third colleague, Mr. Justice Murphy, did not deem it appropriate to apply section 92; in his opinion, the section only covered discriminatory tax measures. Two other justices (Barwick and Stephen) dissented.<sup>131</sup> The presence of a national non-discriminating program, rather than a state one, unquestionably fostered this favourable outcome. An attempt to reverse the decision failed in the *Uebergang v. Australian Wheat Board*

decision; however, once again the diversity of opinions expressed prevents our delineating its broad outlines.<sup>132</sup>

It should be noted, as pointed out by Coper, that in recent years, there has been a marked shift in the High Court of Australia toward an interpretation of section 92 of the Constitution that demands the “public interest” be taken into account in assessing the balance of interests at stake.<sup>133</sup>

### *From Textual Clarity to the Shattering of the Judicial Interpretation*

Thus, despite its apparent clarity, section 92 of the Australian Constitution has been the object of judicial torments. Lord Parker even exclaimed: “In this labyrinth there is no golden thread.”<sup>134</sup> Although the Privy Council and High Court were torn between the proponents of the economic rights of the individual and those who preferred a free trade approach that allows for the pragmatic balance of the interests at stake among members of the Australian federation, both have adhered over the years to the notion of individual economic rights, characterized by confusion, formalism, rigidity, frequent doctrinal veerings, the courts’ profound reluctance to settle major economic questions, and their tendency to distance themselves from the expressed or presumed intention of the authors of the Australian Constitution.

## FREE MOVEMENT OF PERSONS

The free movement of persons is formally guaranteed by sections 117 and 92 of the constitution. Indeed the word “transit” employed in section 92 applies to the movement of persons between the states, regardless of whether such movements imply commercial activity. Section 117 prohibits imposing “any disability or discrimination” on a subject of the Queen simply because the person resides in another state. Section 117 is binding on the commonwealth and the states, but its usefulness is limited as the courts have refused to extend it to distinctions based on “domicile” or those based on residence and some other element. Thus, an Australian state could conceivably adopt a recruitment policy in a sector of economic activity by distinguishing between individuals who are “domiciled” in the state and those who are not.<sup>135</sup>

## COMMON POLICIES AND THE DIVISION OF ECONOMIC POWERS

In the area of economic regulation, the limits of the commonwealth’s powers must be established first, since the states’ powers are defined accordingly. Section 109 of the Australian Constitution ensures the prevalence of the commonwealth’s laws over the states’, while subsection



(xxxix) of section 51 formally stipulates that Parliament's power to legislate extends to "matters incidental to the execution of any power vested by this Constitution in the Parliament or either House thereof, or in the Government of Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."<sup>136</sup> Moreover, it should be noted again that, unlike the Canadian Constitution, which enumerates a series of legislative powers attributed, on the one hand, to Parliament and, on the other, to the provincial legislatures, the Australian Constitution only lists the commonwealth's powers; the residuary powers are attributed to the states (section 107).<sup>137</sup> This process more closely resembles the U.S. Constitution, in which the Tenth Amendment formally entrusts residual powers to the states. During its first decades of constitutional interpretation, the High Court of Australia made section 107 a real counterweight to section 51, which it interpreted in a restrictive manner, thereby delineating a special field of state intervention in the economic sphere. However, in its famous decision in the *Engineers* case, the High Court interpreted the commonwealth's powers in a liberal fashion.<sup>138</sup>

Under section 51, the commonwealth Parliament enjoys legislative powers related to numerous economic activities, as Mr. Justice Murphy pointed out recently:

Other important economic legislative powers of the Parliament are those with respect to the following: par. (3) bounties; par. (4) borrowing money on the public credit of the Commonwealth; par. (12) currency, coinage, and legal tender; par. (13) banking, other than State banking, also State banking extending beyond the State concerned, incorporation of banks, and the issue of paper money; par. (14) insurance, other than State insurance — also State insurance extending beyond the State concerned; par. (16) bills of exchange and promissory notes; par. (17) bankruptcy and insolvency; par. (20) foreign corporations and trading or financial corporations; par. (23) invalid and old-age pensions; par. (23a) various allowances, pensions and benefits and services; par. (29) external affairs; par. (31) acquisition of property on just terms from any State or person; par. (35) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond any one State.<sup>139</sup>

To these powers must be added the commonwealth's full power of taxation (subsection iii), powers related to postal, telegraph, telephone and similar services (subsection v), and powers governing fishing in Australian waters beyond the territorial limit (subsection x).

Aside from this list, subsection (i) of section 51 of the Australian Constitution grants the commonwealth the power to legislate with regard to "trade and commerce with other countries, and among the States." The High Court of Australia has interpreted this provision in a liberal fashion: in the *McArthur* case, Justices Know, Isaacs and Starke stated that the expression "trade and commerce" is not a scholarly one



and is likely to evolve on the basis of changes in commercial activities.<sup>140</sup>

“Trade and commerce” are not limited to the purchase and sale of merchandise: they encompass the movement of goods and persons, transportation by water, land and air, gas and electricity supplies, radio, television, interstate and international movements of bank credits, navigation and maritime affairs. This provision supports the commonwealth’s powers to embark upon such commercial activities as sea and air transportation. The courts were inclined to extend the scope of this constitutional provision to numerous commercial activities, including their intrastate ramifications (to the extent that they cannot clearly be dissociated from interstate activities). Thus, the commonwealth may regulate or even prohibit monopolies and restrictive practices that impede interstate trade. Despite these all-encompassing characteristics, the courts have been more severe when it was a matter of determining the international or interstate nature of a given commercial activity. Thus, it is not sufficient for a local activity to be carried out in relation to an interstate activity for it to become, simply by virtue of this fact, subject to the commonwealth’s legislative norms. The commerce clause of the Australian Constitution is markedly different from that found in the U.S. Constitution, although it is similar to the provision in the Canadian Constitution which grants Parliament legislative power with respect to trade and interprovincial and international commerce, and powers respecting local trade and commerce to the provinces.<sup>141</sup>

The commonwealth’s economic powers have also been considerably strengthened by the High court of Australia’s 1971 decision in the *Concrete Pipes* case. The court elaborated a very generous interpretation of the commonwealth’s powers over foreign corporations and trading or financial companies established within Australia’s territorial limits (which fall under its jurisdiction by virtue of subsection (xx) of section 51 of the constitution), by confirming the commonwealth’s right to control the actual commercial activities of such corporations, whether they are intra- or interstate.<sup>142</sup> This approach, confirmed in *Actors and Announcers Equity and Association of Australia v. Fontana Films Pty. Ltd.*, was adopted in an even more liberal manner by the majority of High Court justices in the *Tasmanian Dam* case.<sup>143</sup> However, it is still uncertain whether this power includes the power to set up such companies and determine their applicable corporate law.<sup>144</sup>

One of the most significant traits of the commonwealth’s economic predominance is revealed by its exclusive right to levy customs and excise duties (under sections 51 (ii) and 90) and the full power of taxation stipulated in subsection (ii) of section 51 of the constitution. The latter power is only limited by formal constitutional prohibitions such as those outlined in subsection (ii) of section 51 and section 99 (which prohibit the commonwealth from discriminating between the states with respect

to taxation and revenues), and in section 114 (mutual and reciprocal immunity from taxation of commonwealth and state property). Moreover, section 88 stipulates that customs and excise duties set by the commonwealth must be uniform throughout the country.<sup>145</sup> The states theoretically enjoy a concurrent right of taxation, except that they are prohibited from levying customs and excise duties.<sup>146</sup> Parliament may not inhibit the states' right to levy their own taxes, for their own purposes, by decreeing that priority be given to the payment of federal taxes over that of state ones.<sup>147</sup> Despite the commonwealth's and the federated states' powers to tax, which are seemingly independent, the central government has managed to take charge of income taxes, thereby ensuring that personal and corporate income taxes are uniform throughout the country. In 1976, however, the federal government announced that it intended to share the field of income tax with the states. The system of grants to the states, although it preserved the uniformity of the tax base and tax collection agreements, was replaced by commitments to pay the states a fixed portion of tax revenues derived from income tax. Moreover, the states were allowed to levy a surcharge on their residents based on a taxation rate of their choice; their participation in the process of determining national taxation policies was also assured. The concrete results of the operation seem disappointing, however, since attempts to reduce fiscal imbalance among the states could be thwarted by the Australian federal government's persistent unilateral modification to the taxation and grant schemes.<sup>148</sup>

Section 90 of the Australian Constitution prohibits the states from collecting customs or excise duties. In recent decisions, the High Court of Australia has adopted a liberal, pragmatic interpretation of the notion of excise and customs; as Mr. Justice Mason emphasized, "the object of the power was to secure a real control over the taxation of commodities."<sup>149</sup> However, the states are still empowered to impose a consumption tax.<sup>150</sup> Moreover, subsection (iii) of section 51 stipulates that "bounties on the production or export of goods" fall within the commonwealth's legislative competence. Thus, a state may not counteract the central government's tariff policy through production or export grants.<sup>151</sup>

Economic coordination is also fostered through mechanisms governing public borrowings. Section 51 (iv) stipulates that the commonwealth is empowered to legislate with regard to the borrowing of money on its credit, while section 105 authorizes it to conclude agreements with the states concerning their public debt. The 1927 financial agreements (modified to date) established a loan council responsible for managing the Australian public debt. By its composition and powers, this federal council formulates and applies a borrowing policy that is binding on all parties concerned.<sup>152</sup>

One of the most centralizing elements in the Australian federal system



is found in section 96 of the constitution; it formally establishes Parliament's right to finance a state directly through grants, to which it may attach whatever conditions it wishes.<sup>153</sup> Exercising this prerogative has enabled the federal government to establish its jurisdiction in the field of income tax, has dissuaded the states from setting up their own taxation schemes (without first reaching an agreement with the commonwealth), and has opened the way for massive federal financial support for the states.<sup>154</sup> Through this mechanism, the central government has been able to enter fields that fall under state legislative jurisdiction, such as housing, hospitals and education.<sup>155</sup> Strictly speaking, the commonwealth does not enjoy a power of constraint, since the state is free to decline the grant offered, but it has rather a highly efficacious power of persuasion. It appears, however, that the recent trend has been for the Australian government to increase the proportion of fixed transfers of revenues to the states, with a concomitant reduction in conditional grants as allowed by section 96 of the constitution.<sup>156</sup>

In addition to the flexibility offered by section 96, the Australian federal government has used section 81 of the constitution to grant funds directly to autonomous agencies (that is, without using the states as intermediaries), and for purposes which do not fall under its legislative powers but under the states' (e.g., social affairs). This way of proceeding, astonishing given the extent of the commonwealth's power under section 96, can be explained by the presumed advantages of the central government's enhanced visibility and greater administrative efficiency in carrying out programs.<sup>157</sup>

The commonwealth's economic powers are further strengthened by its prerogatives in the field of external affairs. Such prerogatives are derived from section 61 and subsection (xxix) of section 51 of the Australian Constitution and, more generally, from Australia's status as a member of the international community. The negotiation and ratification of international agreements are the direct responsibility of the federal executive by virtue of the crown's prerogatives; it seems highly unlikely that the states may legally claim, wholly or in part, such a privilege.<sup>158</sup>

However, individuals are only affected directly by international agreements insofar as such agreements are incorporated into internal law, usually through appropriate legislation. The commonwealth may infringe upon the legislative powers of the states through its legislative power over external affairs, without its being necessary to base this encroachment on any other power mentioned in section 51.<sup>159</sup> The High Court of Australia's recent decisions<sup>160</sup> have confirmed that there is no dichotomy between international and internal affairs; consequently, "there are virtually no limits to the topics"<sup>161</sup> about which the commonwealth may legislate by invoking its powers in the field of external affairs. However, it appears that the federal government may not use its powers in the field of external affairs as a strategem for extending its powers at



the expense of the states. Moreover, section 51 (29) is also subject to an implicit constitutional prohibition to the effect that no legislation based on this power may discriminate against a state or threaten the state's political constitution by preventing, for all intents and purposes, a federated state to exist or function as such. In practice, however, the federal government tends to ensure that it has the states' support in elaborating and implementing international agreements likely to harm them; an agreement to this effect was concluded between the states and the commonwealth in 1977.<sup>162</sup>

## INTERGOVERNMENTAL RELATIONS

The Australian Constitution does not formally recognize intergovernmental cooperation, although it assumes such cooperation in certain areas.<sup>163</sup> The efficient functioning of a federation through the simple division of legislative powers between two levels of government can no longer withstand the overall economic and social pressures which have made various sectors of activity interdependent and called for government intervention. Thus, the Australian federal and state governments are pragmatically engaging in a growing number of intergovernmental arrangements. In 1979, there were no fewer than 325 agreements of various forms (trade agreements signed by government-owned corporations at both levels, formal agreements between the governments themselves, declarations of intent, establishment of mixed commissions or councils, and so on).<sup>164</sup>

The courts have been hesitant to recognize the mandatory nature of intergovernmental agreements, alleging that they are political in nature. With regard to grants made under section 96 of the Constitution, there is an additional argument that the commonwealth, being obliged to maintain control over public expenditures, may not be constrained by a state to comply with the provisions of an agreement involving the payment of funds. The *Financial Agreement Act 1927*, respecting the management of the public debt, is the only intergovernmental agreement which the High Court of Australia has ever declared mandatory and binding on the commonwealth and the states. Three factors appear to be of concern in determining the executory nature of an intergovernmental agreement: (a) its degree of specificity; (b) the circumstances surrounding its elaboration and conclusion; and (c) its political nature.<sup>165</sup>

The New Federalism era launched in the 1970s is aimed at increasing regional responsibilities and improving coordination between federal and state authorities. Administrative delegation from the central to state governments has become more pronounced, as has the establishment of national commissions, recognized by the federal and state governments and responsible for managing specific sectors of economic activity.<sup>166</sup> In 1978, the commonwealth and the states reached agreement on the estab-

lishment of the National Companies and Securities Commission, which ensures uniform administration of legislation in these fields.

The High Court of Australia is proving to be very open to the idea of legislative and administrative cooperation between the commonwealth and the states by limiting its assessment of the validity of pertinent legislative texts to a simple formal analysis.<sup>167</sup> It recently took notice of this type of intergovernmental relation (known as marble cake federalism): indeed, it approved the establishment, by the commonwealth and the State of New South Wales, of a mixed administrative tribunal on the coal industry (both governments adopted similar laws describing the tribunal's makeup and responsibilities).<sup>168</sup> Chief Justice Gibbs explicitly pointed out that nothing in the Australian Constitution prohibits this type of cooperative arrangement.<sup>169</sup> It should be noted finally that the Australian Constitution authorizes legislative delegation from the states to the commonwealth.<sup>170</sup>

This favourable attitude toward the harmonization of commonwealth and states' policies also applies to the harmonization of legislation. The standing committee of commonwealth and state attorneys general assumes this responsibility, although it is hard to assess the value of the work accomplished.<sup>171</sup>

## CONCLUSION

Compared with the Canadian and U.S. constitutions, Australia's Constitution is characterized by the apparent precision of its provisions defining the economic union. But surprisingly, despite its succinctness and clarity, a fundamental provision such as section 92 remains a permanent source of confusion and instability as it is subject to periodic changes of interpretation by the High Court of Australia. This phenomenon appears to result from the court's more or less firm adherence, depending on the period, to the values underlying the ideology of economic liberalism, centred on the primacy of the economic rights of the individual.

The scope of section 92, as we have seen, varies according to whether the majority of the court invokes it to censure the state's methods of intervening in the economy or else sees in it a simple guarantee of the principle of the free movement of goods and production factors. As a result, the interpretation of the fundamental principle enunciated in section 92 has brought about much confusion as to what exactly the states and the commonwealth can or cannot do. Shifted to the courts, the essentially political problem of the state's role in social and economic organization has reappeared there; ideological differences have led to confrontations. Thus, the High Court has been called upon to play a much more "mechanical" role in the application of the principles outlined in the constitution and has adapted them, in what might be thought an obscure fashion, to the overall development of Australian society.



There are numerous similarities between the Australian and Canadian constitutions. However, it is obvious that the federal government of Australia enjoys greater power because of its fiscal prerogatives, direct participation in the financial management of the states, broad powers in the field of commerce, responsibility for external affairs, and freedom to act in the exercise of spending power.

As in Canada, intergovernmental relations and arrangements are increasingly prominent features of the Australian federation, although doubt lingers about the mandatory nature of such administrative agreements signed by both levels of government. It is interesting to note the tendency of the states and central government to adopt similar legislation delegating to mixed agencies the administration or surveillance of changes in a given sector of activity.

## *The United States*

### INTRODUCTION

The legal formulation of the concept of economic union in the United States is derived more from the jurisprudential statements of the Supreme Court and from the intergovernmental agreements than from a clear, express affirmation of it in the constitution itself.

From the outset, two main schools of thought have shaped the interpretation of the U.S. Constitution. Initially, dual federalism prevailed. The powers of the central state and those of the federated states, being perceived as exclusive, required that the courts adhere to an interpretation which enable them to delineate the extent of the powers of both levels of government. The constitution's very nomenclature formally conferred on Congress a limited number of powers (art. 1(8)); residual powers were endowed in the states. This approach encouraged the courts to adopt a highly restrictive interpretation of the powers attributed to Congress, combined with a limited vision of the extent of federal prevalence, which was formally stated in the last paragraph of section 8 of article 1.<sup>172</sup> Adoption of the Tenth Amendment in 1791 (which formally recognized the states' residual power) markedly strengthened the position of its advocates. As a result, Congress was only able to act in fields formally assigned to it; such fields were themselves interpreted restrictively.<sup>173</sup>

In contrast, proponents of cooperative federalism envisaged the link between the central and federated states as an association in which the central authority predominated as supreme trustee of the entire nation's security and interests. In this light, the clause preemption power took on considerable importance since it confirmed the extension of the scope of powers attributed to Congress, combined with the concomitant attrition

of the scope of the Tenth Amendment.<sup>174</sup> Although it occasionally resurfaces, dual federalism was to give way during the turbulent 1930s to cooperative federalism, to which the Supreme Court has constantly referred.<sup>175</sup>

Once these basic conceptual notions are established, it is easier to understand the courts' orientations in elaborating a body of jurisprudence favourable to promoting American economic union. Although the U.S. Constitution confirms in its preamble the desire of American citizens to build "a more perfect union," it is not explicit about the role it ascribes to the free movement of goods (except with regard to the elimination of tariff barriers) and production factors, and the harmonization of economic policies. No provision seems to fill the theoretical role played by sections 121 and 92 of the Canadian and Australian constitutions, respectively, which ensure, relatively successfully, a form of negative integration applicable to the central state and local states. However, the courts have based their judgments on certain provisions in the U.S. Constitution and on its general orientation in elaborating a body of jurisprudence from which emerge the foundations of the particular economic union of the United States. Reference should be made to the commerce clause, the privileges and immunities clause, the equality before the law clause, the federal treaty clause, the import and export of goods clause, federal taxation and spending powers, and the establishment in jurisprudence of the right to freedom of movement.

## FREE MOVEMENT OF GOODS AND CAPITAL

Steeped in the *laissez-faire* philosophy, interpretation of the U.S. Constitution in the economic field, until the upheaval of the Great Depression during the 1930s, went beyond the simple task of maintaining and promoting a common market by placing it within the broader framework of recognition of the fundamental right of individuals to carry on commerce across the country. The priority granted to the rights of individuals explains the courts' insistence in applying the contract clause and the Fifth and Tenth Amendments to measures implemented by the states or Congress that limited the economic freedoms of Americans. During Franklin Delano Roosevelt's presidency, the weakening of judicial control over economic regulation in favour of recognition of the primacy of Congress's decisions in this field was to mark the renewal of the commerce clause's role in the court's establishment of a conceptual framework specifically recognizing its pre-eminent role.

### *Excise and Customs Duties on Imported and Exported Goods*

The first paragraph of section 8 of article 1 of the U.S. Constitution stipulates that Congress is authorized to levy and collect "Duties, Imposts and Excises"; duties are classed as customs duties, excises as



excise duties, while imposts generically cover excise and customs duties.<sup>176</sup> However, the imposition of such tax burdens must be uniform throughout the United States.<sup>177</sup> Moreover, the fifth paragraph of section 9 of article 1 goes further by prohibiting Congress from imposing duties on products exported from any of the federated states; the use of the word “exported” covers foreign countries exclusively.<sup>178</sup> Thus this provision in the constitution has been opposed to duties levied by Congress on products intended for sale on foreign markets.<sup>179</sup>

On the other hand, the second paragraph of section 10 of article 1 of the U.S. Constitution stipulates: “No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws. . . .” The terms “imports” and “exports” only cover goods from foreign countries or those destined for such countries. Originally, the courts applied this clause to state taxes on imports and exports. With respect to imports, the import-export clause quashed any state tax on imported goods in the importer’s possession kept in their original packaging.<sup>180</sup> With regard to exports, the applicability criterion of this clause consisted of determining whether the goods in question were integrated into the “export stream.”<sup>181</sup>

However, in *Michelin Tire Corp. v. Wages*, the Supreme Court dismissed the original packaging doctrine while recognizing the applicability to imported goods in transit in the taxing state of a non-discriminatory *ad valorem* state tax on property. For the court, the problem to be solved was no longer limited to the simple identification of the imported nature of goods, but was to be analyzed instead on the basis of the impost or duty nature of a measure adopted by a state, in light of three political criteria:

The Framers of the constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the states might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.<sup>182</sup>

Since the *Michelin* case, it has been recognized that the principles elaborated therein also apply to exports.<sup>183</sup>

### *Citizens’ Privileges and Immunities*

In addition to constituting one of the mainstays guaranteeing the free

movement of persons,<sup>184</sup> the clause protecting citizens' privileges and immunities (the first paragraph of section 2 of article 4 and Fourteenth Amendment) has also been invoked against state measures supposedly discriminatory toward residents of other states.<sup>185</sup> In the economic field, however, this protection conferred on citizens (excluding corporations)<sup>186</sup> does not prohibit a state from only accepting, for purposes of a non-resident's tax deductions, the latter's expenses incurred in this state since, in this instance the discrimination is not unreasonable or hostile.<sup>187</sup> In assessing the validity of a disputed state tax, the courts usually take into consideration the taxpayer's overall tax situation.<sup>188</sup>

### *Contractual Rights and Obligations*

The first paragraph of section 10 of article 1 stipulates that no state may adopt "any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of the Contracts. . . ." At the beginning of the 19th century, the Supreme Court, basing itself on this provision, attempted to confirm the inviolability of private and public contracts by state authorities. Although valiantly defended by Mr. Justice Marshall, the court was to dismiss this provision by interpreting it, in *Ogden v. Saunders*, as not preventing a state from adopting a bankruptcy law applicable to all *future* contracts. In this case, Marshall expressed the only dissenting view of his career.<sup>189</sup> Under the tutelage of Mr. Justice Taney, the Supreme Court was to make the scope of the clause protecting contractual rights and obligations virtually negligible by opposing them to the public interest. In 1880, the court confirmed that the contract clause did not limit state intervention when such intervention was based on the states' police powers.<sup>190</sup> Although diminished in its scope, the clause is still invoked from time to time.<sup>191</sup>

With regard to the prohibition of the states to adopt "any . . . ex post facto Law," the Supreme Court limited its scope in *Calder v. Bull* to penal laws alone.<sup>192</sup> It should be noted that a similar prohibition also applies to laws passed by Congress.<sup>193</sup>

### *From Protection of Economic Substantive Due Process to that of Fundamental Rights*

Proponents of the freedom to contract and of private property, faced with the weakening of the clause protecting contracts as a defence against state economic regulation, invoked the protection granted by the Fifth and Fourteenth Amendments.<sup>194</sup> In reference to Congress, the Fifth Amendment stipulates that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." and the Fourteenth Amendment, in reference to the states, similarly states ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." Beyond simple procedural protection, the courts have elevated the scope of these amendments to the level of a constitu-



tional protection of the freedom of persons and corporations to enter into contracts.<sup>195</sup> Thus, the courts were called upon to balance constraints imposed on an individual and a given measure's anticipated benefits to the public, reserving for themselves the right ultimately to determine whether or not a state had overstepped the bounds of its police powers. Three criteria had to be met: (a) the end being sought had to be admissible or legitimate without being unreasonable, arbitrary or hostile; (b) the means used had to be closely linked to this objective; and (c) the fundamental rights of individuals had to be respected.<sup>196</sup>

Until the 1930s, measures aimed primarily at economic regulation were perceived as vulnerable to the courts' acceptance or dismissal, since the freedom to enter into contracts was considered a fundamental right.<sup>197</sup> In the 1930s, on the strength of the Fourteenth Amendment,<sup>198</sup> and with some hesitation, the Supreme Court began to retreat from judicial control of economic regulation, while unexpectedly reinforcing Congress's powers under the commerce clause.

Subsequently, the Supreme Court, falling back on a more limited interpretation of the Fourteenth Amendment and on other provisions in the U.S. Constitution, confirmed their role as a guarantee of certain fundamental individual rights (as opposed to economic rights as such), including the freedom of expression and the right to private life, which call for greater compassion from the courts. Certain of the states' restrictive commercial practices, such as prohibitions against advertising goods or services, were quashed as incompatible with the freedom of expression.<sup>199</sup> The American courts were able to refer to the obligation of due process in the Fourteenth Amendment as a mechanism for protecting individuals and corporations against state taxes violating this guarantee.<sup>200</sup> Among other things, the prescriptions in this amendment have recently been applied to unitary taxes adopted by certain states.<sup>201</sup>

Despite the fact that only the Fourteenth Amendment clearly states that the state is prohibited to deny "to any person within its jurisdiction the equal protection of the Laws," it is to be noted that the courts have applied the same principle to the interpretation of the Fifth Amendment, applicable to Congress.<sup>202</sup>

### *Congressional Power of Taxation*

Under the first paragraph of section 8 of article 1, Congress has the right "to lay and collect Taxes." However, this apparently plenary power is limited by the sixth paragraph of section 6 of article 1, which stipulates that "no tax . . . shall be laid on Articles exported from any State," and by the fourth paragraph of section 9 of article 1, which prohibits Congress from levying a direct tax. Because of the latter restriction, in 1895 the Supreme Court declared the establishment of a federal income tax scheme unconstitutional.<sup>203</sup> In response to this decision, the sixteenth Amendment was promulgated in 1913, to confer the power to levy and

collect such taxes formally on Congress.<sup>204</sup> At the height of the doctrine of dual federalism, the courts made sure that Congress did not use its powers of taxation to regulate a field that fell under state jurisdiction. However, the decline of this type of federalism and the rise of cooperative federalism undermined the rigour of this approach; the courts hesitated to examine the ultimate ends pursued by Congress in the formulation of its tax policies.<sup>205</sup> Similarly, that tax immunity of both levels of government respecting their agencies and operations proved short-lived, since it has now been firmly established that Congress is empowered to tax the states. On the other hand, Congress, through its preempting right, has the possibility of making the states' tax measures<sup>206</sup> non-applicable to its own agencies and operations. It goes without saying that Congress's powers of taxation are still subject to prohibitions set out in the Bill of Rights.<sup>207</sup>

In practice, the federal government keeps a substantial portion of income tax, while the states secure funds primarily through consumption taxes. In the field of income tax, a certain degree of vertical fiscal harmonization between the federated states and the federal government has been achieved through administrative coordination and by the schedule of deductions and tax credits found in federal legislation. With regard to horizontal fiscal harmonization, most states grant their taxpayers a credit proportional to the taxes they have paid in another state. However, coordination between the states of their corporate income tax systems has encountered major problems in the past, despite the fact that 25 of the 46 states with such a tax have adopted a common legislative model, and that a number of them participate voluntarily in the Multi State Commission and adhere to the Multi State Tax Compact.<sup>208</sup> To date, the thorniest problem remains the best way of dealing with unitary taxes levied by several states.<sup>209</sup> Unlike Australia, it is to be noted that Congress has not deemed it appropriate to force the states' hand through more restrictive use of the conditional grants made to them.<sup>210</sup>

### *The Commerce Clause*

The commerce clause, contained in the third paragraph of section 8 of article 1 of the U.S. Constitution, confers on Congress the power to regulate commerce with foreign countries, between various states and with Indian tribes, and poses as a promotional agent for economic integration.<sup>211</sup> It is the most important constitutional provision affecting the free movement of goods and production factors.

At first glance, the commerce clause confers legislative powers on Congress without prohibiting state intervention in the absence of positive moves from Congress. However, jurisprudence has ascribed to it a negative control role over state powers.<sup>212</sup> This provision reflects an "alertness to the evils of economic isolation and protectionism"<sup>213</sup> likely to jeopardize the maintenance of a national common market.<sup>214</sup>



The negative aspect of the commerce clause condemns state attempts at promoting their economic interests at the expense of the nation's.

During the first decades of its existence, the commerce clause served essentially to protect the inviolability of contracts against repeated attempts by the states to control certain commercial activities through legislation. Concurrently, the Supreme Court preserved Congress's prerogatives to regulate the economy in the event it were to show its interest to do so.<sup>215</sup> In *Gibbons v. Ogden*,<sup>216</sup> Mr. Justice Marshall of the Supreme Court stated that the central state enjoyed autonomous legislative powers to regulate interstate activities, subject to constitutional prohibitions. With respect to the states, they were still empowered to exercise a certain indirect influence over commerce while pursuing legitimate state objectives which did not conflict with federal legislation.<sup>217</sup> Congress's exclusive power to regulate interstate commerce, combined with a recognition of the states' right to exercise their police powers (the double aspect approach), was soon to be called into question in remarks made by Mr. Justice Taney, who envisaged the regulation of commerce as a concurrent field shared by Congress and the states, compounded, however, by the federal government's prevailing authority.<sup>218</sup>

*Cooley v. The Board of Wardens of the Port of Philadelphia*,<sup>219</sup> the landmark decision in the interpretation of the commerce clause, was released in that context. Under the direction of Taney, the Supreme Court rejected the theory of the reciprocal exclusivity of Congress's and the states' powers in favour of a notion of cooperative federalism.<sup>220</sup> The court modified its approach to the commerce clause by focussing not on its nature, but on the subjects to which it should be applicable. Subjects of an intrinsically national nature and demanding uniform regulation fell under Congress's exclusive jurisdiction, while the states preserved the possibility of controlling other fields of commerce. Thus, the states were empowered to regulate interstate commerce provided doing so was not incompatible with federal legislation and, moreover, that they were authorized to do so.<sup>221</sup>

Subsequent to the *Cooley* decision, the American courts followed an ambiguous course in interpreting the commerce clause, because of the accepted dichotomy between "local commerce" and "interstate commerce." The Shreveport doctrine, developed in 1914, extended the commerce clause to cover local commercial transactions which were so closely linked to interstate commerce that it was necessary to subject them to it.<sup>222</sup> Thus, the commerce clause only threatened local activities with "direct" legal effects on interstate commerce. At the time, activities related to production escaped central government control because they were considered purely local, without direct effect on interstate commerce. To the contrary, state regulation which discriminated against interstate commerce to the benefit of local commerce was highly likely to be quashed.<sup>223</sup>

Resulting from this Manichaenism and the constraints of the Tenth Amendment, neither Congress nor the states was able to manage the economy efficaciously.<sup>224</sup> With the impetus of Roosevelt's New Deal, the Supreme Court underwent a major reorientation by returning to the elementary principles of cooperative federalism expressed in the *Cooley* decision, i.e., to the pragmatic determination by the courts of the field of commerce accessible to the states.<sup>225</sup> In this new context, the Supreme Court dismissed recourse to the distinction between measures having "direct" effects and those having "indirect" effects on interstate commerce.<sup>226</sup> Indeed, there is no longer any interstate commerce rigorously separated from local commerce.<sup>227</sup> For all intents and purposes, the federal state enjoys unlimited powers of intervention,<sup>228</sup> except that it cannot question the institutional existence of the states<sup>229</sup> and must respect the Bill of Rights. When Congress exercises its regulatory powers under the commerce clause with respect to an activity which in its view has repercussions on interstate commerce, the courts will only quash the regulation if it clearly does not obey any rational motive or if there is no logical link between the mechanisms for intervention chosen and the objectives pursued.<sup>230</sup> Moreover, Congress has the unquestionable right to prohibit commercial activities that it deems prejudicial to public health and safety, or the morality or well-being of society.<sup>231</sup> The notion of "commerce" has been interpreted very broadly to cover commercial relations overall, including sales or purchase contracts, provisions respecting prices, and the movement of tangible or intangible assets.<sup>232</sup>

The *Cooley* doctrine recognizes Congress's supremacy with respect to regulating interstate and international commerce. The constitutional control of the states' trade regulation measures occurs at two levels. First, it is judicial, although in the final analysis it is the responsibility of Congress. Indeed, in the absence of Congress's intervention, the courts ensure surveillance of and compliance with the commerce clause, although they submit, as need arises, to the express will of the federal government. In this respect, the Supreme Court functions as a court of common law rather than a true constitutional court, since it accepts that its own decisions may be reversed by an ordinary law adopted by Congress.<sup>233</sup> Better known as the Dormant Commerce Clause, this procedure makes the commerce clause a form of negative protection of economic integration; however, it is applicable solely to state intervention.

This approach is well illustrated by the insurance industry, a typical case. In *United States v. South-Eastern Underwriters Association*,<sup>234</sup> the Supreme Court supported the applicability of the *Sherman Act* respecting coalitions to insurance companies, thereby paving the way for national regulation of these companies. Instead of using this opportunity, Congress promulgated the *McCarran-Ferguson Act*, expressly



recognizing state powers over the insurance business. In *Prudential Insurance Co. v. Benjamin*,<sup>235</sup> the Supreme Court noted Congress's decision to reverse its judgment in the *South-Eastern Underwriters* decision and confirmed Congress's powers to authorize the states to control the insurance business even where such regulation impedes interstate commerce.<sup>236</sup>

The *Cooley* doctrine specifies not only the basis of federal intervention in commerce but the states' right to regulate it in the absence of a federal act, as well as the exercise of state fiscal powers over interstate commerce and the scope of the right of pre-emption.<sup>237</sup>

Generally, embargoes and preferential or clearly discriminatory treatment imputable to the states and which affect interstate commerce are ostensibly invalid since ultimately, through protectionist measures, they unduly impede free economic movement.<sup>238</sup> On the other hand, in the absence of incompatible federal norms, the state may regulate interstate commerce insofar as its action rests on a legitimate preoccupation with establishing regulations reasonably necessary for maintaining the health, safety, order, comfort or general well-being of society<sup>239</sup> (commonly called policy powers). For a state regulation that has repercussions on interstate commerce to survive possible challenge, it must fall within state police powers, not affect a sector in which only national regulation is admissible and, if need be, pass the ad hoc test of the balance of interests. In other words, state regulation will be invalid if the consequences for interstate commerce are greater than the presumed local advantages or if less restrictive measures might have been used to achieve the same ends. Mr. Justice Stewart of the Supreme Court summarized as follows the intricacies of these criteria for analysis in the *Pike v. Bruce Church, Inc.* decision:

Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>240</sup>

In the course of its examination, the Supreme Court takes into consideration the practical effects of the disputed legislation.<sup>241</sup>

During the 1970s, the Supreme Court made it in part possible to escape the rigours of the commerce clause by distinguishing between the state as market regulator and its intervention as a simple participant. In *Hughes v. Alexandria Scrap Corp.*, the State of Maryland had established a grant program intended to help scrap merchants in the recovery of vehicles. Despite the fact that eligibility criteria governing the program treated local and out-of-state scrap merchants differently, the court

concluded: “Nothing in the purposes animating the commerce clause prohibits a State, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others.”<sup>242</sup>

Subsequently, the Supreme Court was to approve the State of Dakota’s policy of limiting the sale of cement produced in its facilities to its residents alone by declaring that “the basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law.”<sup>243</sup> The Supreme Court took the same approach when it refused to submit to the control of the commerce clause an executive ordinance issued by the mayor of Boston stipulating that all construction wholly or partially financed with the city’s own funds or funds it administered must be carried out using labour including at least 50 percent of city residents.<sup>244</sup> In this instance, the court was only concerned with determining if “the challenged ‘program constituted direct state participation in the market.’”<sup>245</sup> The 1980 *South Central Timber Development, Inc. v. Wunnicke* case<sup>246</sup> illustrates the difficulty of delineating the “direct” nature of a state’s market participation. In this instance, the State of Alaska required in its contract that holders of forestry concessions in the state’s public domain carry out primary processing of timber within the state before exporting it. Mr. Justice White (supported by Brennan, Blackmun and Stevens) declared that a state acting as a market participant “may not impose conditions, whether by statute, regulation, or contract that have a substantially regulatory effect outside of that particular market.”<sup>247</sup> From his analysis of the facts, the learned justice concluded that the state’s intervention as a participant in the timber market did not enable it to control the wood-processing market.<sup>248</sup> The precariousness of the doctrine of the state as market participant is to be noted when a restriction affecting international commerce comes into play.<sup>249</sup>

The commerce clause has also been employed extensively to control state powers of taxation. The courts have shown themselves to be unequivocally intolerant toward state taxes, whether discriminatory in theory or in practice, aimed at fostering local commerce to the detriment of interstate commerce.<sup>250</sup> They have also rigorously scrutinized state taxes likely to engender multiple taxation (unitary taxes).<sup>251</sup> Moreover, use taxes adopted by certain states have been recognized as valid, as have collection rules that require vendors operating within these states to collect these taxes on goods they sell.<sup>252</sup> State consumption or property taxes, levied on local products and those from other states or abroad, have been maintained,<sup>253</sup> along with business taxes on local or outside companies.<sup>254</sup> As Supreme Court Justice Blackmun noted in the *Complete Auto Transit* decision: “It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their share of tax burden even though it increases the cost of doing business.”<sup>255</sup>



To deal with the complexity of the situations coming before it, the Supreme Court in the 1950s adopted a simple solution called the Formal Rule. Essentially, this rule called for judicial invalidation of any state tax levied on any activity qualified as “interstate.” The scope of the commerce clause continued to expand; activities likely to be qualified as interstate multiplied appreciably, thereby diminishing the states’ tax base.<sup>256</sup> Then in reaction to this trend, the Supreme Court abandoned the Formal Rule and in *Complete Auto Transit v. Brady* outlined the criteria which a state tax must satisfy to be recognized as valid. Such a tax must: (1) be closely linked to the state which adopts it; (2) be levied for services rendered by the state; (3) be apportioned equitably; and (4) not discriminate against interstate commerce.<sup>257</sup> The second criterion does not imply very rigorous control by the courts, since the Supreme Court concluded that the rate of a given tax falls under the government’s discretion, provided it does not impose an unreasonable burden on interstate commerce.<sup>258</sup> Moreover, the Supreme Court is interested in the practical effects of a state tax on interstate commerce; it is of little consequence to it that such a tax be levied on the local production of goods prior to their entry into the interstate or international stream of commerce.<sup>259</sup>

With regard to state taxes which affect international commerce, they must fulfil two conditions: (1) the disputed state tax must not occasion a serious risk of multiple taxation; and (2) it must not deprive the federal government of its authority to speak with one voice concerning the regulation of international commerce.<sup>260</sup>

The supremacy of federal laws is assured by Congress’s power of pre-emption found in section 2 of article 6 of the U.S. Constitution. Pre-emption intervenes when a state hinders “the accomplishment and execution of the full purposes and objectives of an Act of Congress.”<sup>261</sup> For the principle of predominance to come into play, Congress must express its intention to occupy a given field, or a conflict must exist between a provision in federal legislation and one in state law (e.g. where an individual is unable to comply with both stipulations at the same time).<sup>262</sup> The task undertaken by the courts is an exceedingly delicate one as, in this context, it is not a matter of weighing federal interests against those of the states where the federal government has not taken a stand, but to distinguish one level of government from the other when Congress has indicated its intentions with respect to a disputed field. Thus, with respect to commercial matters, in *Burbank v. Lockheed Air Terminal*<sup>263</sup> the Supreme Court concluded (in a 5–4 split decision) that federal regulations respecting air safety pre-empted the curfew decreed by the City of Burbank.

The all-encompassing nature of the commerce clause has had an appreciable impact on most economic sectors. Congress’s direct action and jurisprudential interpretation have created a pragmatic, constantly

shifting division of economic regulatory powers between State and federal authorities. The following cursory enumeration of various fields of economic intervention<sup>264</sup> makes it possible to discern the consequences of the commerce clause for the American economy, and its very great flexibility.

**Agriculture** It has been established that Congress may regulate agricultural production even when it is destined for local consumption. Numerous national marketing schemes have been established, covering wheat, corn, rice, tobacco, cotton and peanuts. Federal intervention is also predominant in the marketing of other products such as fruit, vegetables and milk, establishing standards and the sanitary and hygienic inspection of products.<sup>265</sup>

**Banking** Banking is subject to prescriptions contained in the commerce clause. In *Lewis v. Bankers Trust Investment Managers Inc.*, the Supreme Court quashed a provision in a State of Florida law which prohibited a bank holding company from acquiring a finance company specializing in financial consulting. However, the court clearly indicated that the states were empowered to regulate financial institutions to the extent allowed by the commerce clause.<sup>266</sup>

The American system of bank regulation is highly complex, in that it permits the coexistence of national and local banks. More recently, profound changes have occurred resulting from the emergence of powerful “nonbank” financial groups and from the trend toward extending financial services that various financial institutions may offer.<sup>267</sup>

**Communications** The commerce clause covers telegraphy, telephony, radio and television broadcasting and the gathering of news by news agencies and its distribution to clients. The Federal Communications Commission, established in 1934, regulates radio, television, cable distribution and telephone services.<sup>268</sup>

**Transportation** It has been firmly established that the commerce clause applies to the transporting of goods and persons by water, air, rail and road, as well as oil and gas pipelines and electrical transmission lines.<sup>269</sup> Thus, on its celebrated *Wabash, St-Louis and Pacific Railway Co. v. Illinois* decision, the Supreme Court invalidated a state law setting railway tolls within the state, including those covering trips starting from or ending at destinations in another state. The court concluded “that this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations.”<sup>270</sup> In response to this judgment, Congress had no choice but to involve itself in the regulation of railways by establishing and commissioning for this purpose the Interstate Com-



merce Commission (ICC) in 1887.<sup>271</sup> More recently, an Arizona law which declared illegal the operation of trains with more than 14 passengers or more than 70 freight cars was declared unconstitutional as a proliferation of such norms would make it impossible to establish a national railway system.<sup>272</sup>

In the field of road transportation, however, the Supreme Court recognized in *South Carolina State Highway Department v. Barnwell Brothers*, the state's right to regulate the weight and width of vehicles using its road and highway network. Since then, this approach has been clarified in *Raymond Motor Transportation Inc. v. Rice* when the Supreme court refused to ratify a State of Wisconsin law prohibiting trucks more than 55 feet long from operating on its highways. In this case, the court weighed the state's claim that such a norm was aimed at ensuring road safety and it assessed such a measure's impact on interstate commerce.<sup>273</sup>

Under the leadership of the Reagan Administration, the whole transportation industry has experienced severe changes characterized by waves of "deregulation" of its activities.<sup>274</sup>

**Corporate law and securities transactions** Historically, corporate law has fallen under state jurisdiction. In *Cort v. Ash*, the Supreme Court pointed out that corporations:

are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to shareholders, state law will govern the internal affairs of the corporation.<sup>275</sup>

The courts have shown considerable deference in this regard by presuming the validity of corporate law promulgated by a state in the absence of incompatible legislation adopted by Congress.

Since 1934, the Securities and Exchange Commission (SEC) has assumed national control of the securities market. To all intents and purposes, the regulation of stock exchanges and the securities listed on them is supervised by a federal agency. In 1975, Congress asked the SEC to encourage the implementation of a truly national securities market. Since 1978, the electronic hook-up of stock exchanges has developed under the Intermarket Trading system.<sup>276</sup> However, the states' role in regulating the securities market is not negligible; the Supreme Court has, on several occasions, recognized the validity of state regulations governing the conduct of brokers or exchange agents, although it has not hesitated to reject controls established by the states respecting seizures of commercial companies.<sup>277</sup>

**Insurance** As we emphasized earlier, the insurance business has not escaped the commerce clause's tentacles. However, by adopting the

*McCarran-Ferguson Act*, Congress formally demonstrated a desire to leave responsibility for regulation in state hands, except where it indicated otherwise.

**Labour relations** Congress's intervention in the field of labour relations and standards is extensive; the Supreme Court has confirmed that under the commerce clause, Congress is empowered to regulate them insofar as they affect commerce.<sup>278</sup> However, in 1976 the court refused to apply provisions in the act covering wages and hours of work to state employees, claiming that doing so would violate the fundamental principles of American federalism,<sup>279</sup> although, to the contrary, in 1983 the *Age Discrimination in Employment Act* was recognized as applying to them on the basis of these principles.<sup>280</sup> The federal government, basing itself on the commerce clause, controls pension funds and establishes price and wage controls.<sup>281</sup>

**Bankruptcy law** The fourth paragraph of section 8 of article 1 of the U.S. Constitution expressly confers upon Congress the power "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." In the absence of legislative intervention by Congress, the states may involve themselves in this field. When Congress becomes involved, it must respect the imperative uniformity criterion and may not circumvent it by invoking the commerce clause. However, this principle does not prohibit Congress from incorporating certain prescriptions contained in the legislation of one or more states, since the obligation to achieve uniformity is geographical rather than personal.<sup>282</sup>

**Competition** As the adoption in 1890 of the *Sherman Act* indicates, Congress quickly became involved in regulating competition. This act made agreements and conspiracies restricting interstate and foreign commerce illegal. On several occasions, the Supreme Court endorsed the exercise of such powers by Congress,<sup>283</sup> but at the beginning of the 1940s it interpreted the latter's intention as not depriving the states of their ability to regulate these restrictive practices. The doctrine of "State Action Exemption," outlined in *Parker v. Brown*,<sup>284</sup> protects actions taken in response to a state's imperative demands from the application of federal legislation on competition.<sup>285</sup> The Supreme Court refined the scope of the *Parker* decision by making it necessary for the constraint justifying the exemption to be actively supervised by the state concerned. The legislative scheme adopted by the State of California to ensure the maintenance of wine prices was not considered a defence applicable to the *Sherman Act* since the Supreme Court was not satisfied with the degree of supervision exercised by the state.<sup>286</sup> Congress in 1984 extended the application of the "State Action Exemption" to cover measures decreed by local administrations.<sup>287</sup>



**Federal, state and local government preferential purchasing policies** Congress has had little hesitation in the past decades to establish, where need be, preferential purchasing policies for the benefit of American suppliers. Preferential purchasing policies sometimes take the shape of explicit legal requirements such as those of the so-called “*Buy American Act*.” In a like manner, numerous states have established preferential purchasing policies of their own. However, there is little doubt that Congress, should it choose to do so, could push aside those state policies.<sup>288</sup>

**Natural resources** Traditionally, the Supreme Court has exempted from the commerce clause state regulations limiting the exporting of natural or wildlife resources: it took this decision while invoking the states’ role as a trustee in managing community property.<sup>289</sup> This theory, stated in *Gerr v. Connecticut*,<sup>290</sup> was formally dismissed in the *Hughes v. Oklahoma* decision;<sup>291</sup> the Supreme Court confirmed the applicability of the customary principles of the commerce clause to the states’ regulatory acts covering commerce related to their natural resources. The Supreme Court also came out against state measures deemed protectionist because they resulted in the establishment of a preference in the development or production of natural or energy resources for the benefit of residents of the states concerned. In *West v. Kansas Natural Gas Co.*, the court quashed a State of Oklahoma law prohibiting the export outside its territory of locally produced natural gas.<sup>292</sup> Similarly, a State of Pennsylvania law stipulating that locally produced natural gas must be employed to satisfy the needs of its citizens before surpluses were exported was deemed incompatible with prescriptions contained in the commerce clause.<sup>293</sup> In 1982, in *New England Power Co. v. New Hampshire*, a public utilities board ordinance in this state prohibiting New England Power from selling its electricity outside the state before preferentially satisfying internal demand was quashed by the Supreme Court.<sup>294</sup>

Thus, it is virtually certain that manifestly discriminatory regulatory measures, which, in practical terms, block the movement of natural resources, will be declared invalid. On the other hand, when the disputed norms do not operate on the basis of a discriminatory treatment between intrastate and interstate movement, the Supreme Court weighs the burden of state restrictions on interstate commerce, while displaying the utmost reserve to avoid hindering the legitimate exercise of state police powers. Except in the case of obvious discrimination, it appears that the court considers the conservation and quality of water as essential to the protection of public health. Moreover, as we mentioned earlier, the Supreme Court hesitates to reprimand state intervention when the states act as market participants rather than legislative authorities.<sup>295</sup> Finally, it recently reiterated that the commerce clause, beyond its

inherent negative control, empowers congress to become fully involved in the direct regulation of resources, from their production to their distribution to consumers.<sup>296</sup>

**Power to make treaties** Although the U.S. Constitution is vague about the scope of the power to make treaties found in the second paragraph of section 2 of article 2, the Supreme Court has emphasized the federal government's full power to direct the country's foreign policy, including its commercial policy. Consequently, the federal executive may infringe upon the jurisdictions attributed to the States under the residual power conferred upon them by the Tenth Amendment as though that amendment did not exist. This exclusivity respecting foreign affairs is linked to the formal prohibition for the states to conclude alliances or treaties, contained in the first paragraph of section 10 of article 1: "No State shall enter into any Treaty, alliance or confederation. . . ." The applicability of measures decreed by the states in these areas is limited to those having an "indirect" or "circumstantial" effect and which arise from the legitimate exercise of their powers. As a result, there is scarcely any doubt that the U.S. federal government is able to block the preferential purchasing policies of several states where the requirements of its foreign commercial policy so dictate.<sup>297</sup>

The third paragraph of section 10 of article 1 authorizes the states to conclude "agreements" or "compacts" among themselves provided they obtain Congress's consent. However, the courts have interpreted this prohibition flexibly by limiting it "to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"<sup>298</sup>

## FREE MOVEMENT OF PERSONS

The U.S. Constitution does not specifically recognize the principle of the free movement of persons<sup>299</sup> within the country, although the courts have managed to draw from certain of its provisions or its general orientation the lines of force guaranteeing its respect.

### *The Commerce Clause*

In 1824, in *Gibbons v. Ogden*, the Supreme Court confirmed that "commerce" includes the commercial transportation of passengers, thereby suggesting that the movement of persons could be analyzed according to the criteria for applying the commerce clause.<sup>300</sup> In *Edwards v. California*, five Supreme Court justices based themselves on the commerce clause to quash a California law making it an offence to help an indigent person enter California.<sup>301</sup> That was all it took for the commerce clause to become the pre-eminent arm for attacking racial discrimination found



in certain legislation governing the transportation of passengers.<sup>302</sup> Recently, in *United States v. Guest*, the Supreme Court reiterated that the commerce clause authorized Congress “to legislate for the protection of individuals from violations of civil rights that impinge on their free movement in interstate commerce.”<sup>303</sup>

### *Citizens’ Privileges and Immunities*

This clause stipulates that “the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the Several States” and is one of the principal bulwarks which discriminatory measures based on the status of state citizenship or residence of individuals come up against. However, it should be noted that this clause is not applicable to the acts of the American federal government or of those of American territories.<sup>304</sup>

Originally, the courts envisaged the clause respecting privileges and immunities as prohibiting the states from interfering with certain fundamental rights.<sup>305</sup> However, the Supreme Court abandoned this approach in favour of an interpretation limiting the clause’s scope to the right to equal treatment by residents and non-residents.<sup>306</sup> This theory was interpreted flexibly as the distinctions adopted by the states with respect to non-resident citizens were not all illegal. Indeed, jurisprudence, distinguishing between the states’ regulatory activity and their activities as owners, concluded that the provision covering privileges and immunities did not confer on an American citizen who is a non-resident of a state an interest in the state’s community property equivalent to that of a resident.<sup>307</sup> This exception to the rule in applying the clause respecting immunities and privileges was subsequently appreciably watered down; the Supreme Court limited itself to pointing out, in *Hicklin v. Orbeck*, that the ownership aspect is only a simple factor to be taken into consideration — “although often the crucial factor — to be considered in evaluating whether the statute’s discrimination violates the clause.”<sup>308</sup> Aside from this special case, which constitutes the states’ ownership interest, the Supreme Court has endeavoured to elaborate a flexible methodology which makes it possible to mitigate confrontation between individual and state interests.

In the *Toomer v. Witsell* decision, the court stated that the clause respecting the immunities and privileges of citizens was only aimed at discriminatory state measures covering non-citizens or non-residents, measures which were not justified by any “substantial reason.”<sup>309</sup> This decision reoriented interpretation of the clause toward the analysis of motives which led a state to adopt certain discriminatory measures.<sup>310</sup> In *Baldwin v. Fish and Game Commission*<sup>311</sup> the court refined its analysis by affirming that the protection of the clause respecting immunities and privileges could only be invoked when fundamental rights were at stake and when the discriminatory measures in question could not be explained by a serious motive.<sup>312</sup>

### *Equality Before the Law and Freedom of Movement*

The Fourteenth Amendment stipulates that no state may deprive “any person within its jurisdiction of the equal protection of the laws.” In *Shapiro v. Thompson*, the Supreme Court referred (needlessly, according to one doctrine) to the clause respecting equality before the law in the Fourteenth amendment to quash a federal family assistance program which provided for a minimum period of residence in the state offering the service as a condition for eligibility.<sup>313</sup> This reference to the Fourteenth Amendment indirectly conferred on Congress the power to pass laws to eliminate impediments created by the states to the exercise of this power.<sup>314</sup> Moreover, the Supreme Court, invoking the Fifth amendment, applied the same validity criteria to conditions for eligibility to public services adopted by the District of Columbia.<sup>315</sup>

The importance of the *Shapiro* decision arises not only from its relevance for interpretation of the Fourteenth Amendment but from the fact that it is the first affirmation by the Supreme Court guaranteeing the free movement of persons, in opposition to federal and state laws and regulations.<sup>316</sup> The court, not deeming it appropriate to link freedom of movement to one or the other of the formal provisions in the Constitution, concluded that the right derived from the very nature “of our Federal Union and our constitutional concepts of personal liberty”<sup>317</sup> and that only laws containing rigorous necessity criteria could infringe upon it.

Generally, conditions related to the duration of residence as a condition restricting the exercise of fundamental rights are perceived as a violation of the right to freedom of movement.<sup>318</sup>

### THE FEDERAL GOVERNMENT’S SPENDING POWER

The federal government’s spending power remains one of its most powerful forms of intervention in providing and controlling various public services and it has been the focal point of lively debate regarding its presumed corrosive effects on the federal structure itself.<sup>319</sup> This power is derived from the first paragraph of section 8 of article 1 of the U.S. Constitution, which stipulates: “The Congress shall have Power to . . . provide for the . . . general Welfare of the United States.”

The courts have constantly refused to restrict the federal government’s spending power by applying the Tenth Amendment to it (the states’ residual power).<sup>320</sup> Although, in theory, the federal government may not constrain a state to act in a particular manner, the courts have given up rejecting federal grant programs, whose conditions are in effect mandatory, under the pretext that the states are free to adhere or not to adhere to them.<sup>321</sup> However, the Supreme Court has clearly established that the power to spend derived from the exercise of fiscal powers should be linked to the quest for a “general,” i.e., common, benefit, as opposed



to a purely “local” one, and that it is not justified when used arbitrarily.<sup>322</sup>

## INTERGOVERNMENTAL RELATIONS

Since Franklin Roosevelt’s presidency at the end of the 1930s, American federalism has gradually evolved from a traditional system based on a rigorous division of powers between the central government and the federated states to one in which intergovernmental relations play a leading role because of the interdependence and overlapping of numerous functions exercised by Washington and the states.<sup>323</sup> Postwar intergovernmental relations developed along a model that favoured growing federal government intervention in various aspects of economic and social life. Federal intervention took the form of categorical grants (involving numerous specific federal controls), block grants (federal funds grouped together for broad purposes and according greater discretion to beneficiary states), unconditional transfers, or a proliferation of various regulatory requirements.<sup>324</sup>

At present, this federalism is undergoing a major reorientation, under the prompting of President Ronald Reagan, whose new federalism entails returning to the states the management of, and responsibility for, federal programs related primarily to education, transportation, social services and community development.<sup>325</sup> The theoretical foundations of this new approach are based on two assumptions: (1) as benefits arising from domestic government expenditures are internal to each of the states, decisions respecting taxes and spending should, as far as possible, be taken at this level; and (2) the redistribution of wealth “is not a compelling justification in the 1980s for federal taxing and spending programs.”<sup>326</sup> The first phase, carried out in 1981, resulted in the consolidation of federal grant programs combined with a significant reform of the tax system; the second phase, launched in February 1982, set in motion the transfer of numerous federal programs — such as those covering education and urban transportation — to state and local governments, and a redistribution of responsibilities in the field of health care.<sup>327</sup>

A review of the situation shows that, until now, the Reagan reform has essentially affected individuals, especially low income earners. The effects of cuts in federal grant programs to state and local governments, aside from capital expenditures, have not been as lasting as cuts in programs intended for individuals. It is also to be noted that federal assistance to state and local governments for the construction of public facilities such as roads, canal systems and public transportation has stabilized, or increased, in recent years. Generally, the states have hesitated to compensate for financial losses resulting from cuts in

assistance programs intended for individuals, while they have hastened to increase funds allocated to improving public facilities.<sup>328</sup>

With respect to the harmonization of legislation, the National Conference of Commissioners on Uniform state Laws, established in 1892, ensures exchanges of information between the states and proposes model legislative texts related to various topics. However, to date, the conference has only obtained mitigated results, since the states are reluctant to incorporate the texts submitted to them into their internal legislation. Nonetheless, mention should be made of the remarkable success achieved by the Uniform Commercial code, which all of the states have adopted except Louisiana and the District of Columbia. In addition to the conference, other agencies help harmonize legislation; these include the American Law Institute in the field of common law, and the business law section (corporation, banking and business law) of the American Bar Association, whose model legislation project covering corporations has been adopted by 35 states.<sup>329</sup>

## CONCLUSION

Contrary to the Canadian Constitution, the U.S. Constitution is almost mute on the very concept of economic union. It is essentially on the basis of an article attributing power to Congress in the realm of interstate and international commerce that American courts have delineated the fundamental principles of this union. The courts, having deemed that it was a well-established fact that Congress adequately represented the will of the states, gradually came to ascribe to congress predominant powers in most sectors of the economy. Concurrently, however, they established that, in the absence of any direct — or, by implication, necessary — federal intervention, the states could intervene in various sectors of the economy. In cases where such intervention appeared to hinder interstate or international commerce, the courts proved intransigent when intervention was obviously discriminatory and, in other cases, they elucidated criteria for examining the balance of interests. As we saw earlier, according to these criteria, state intervention is deemed invalid if its consequences surpass presumed local advantages or if less restrictive means could have been used to achieve the same ends.

In the field of taxation, it is not easy to retrace federalist thought underlying court decisions. Recent Supreme Court decisions, while attesting to the court's deference to the disputed state taxes, indicates its preoccupation with not unnecessarily reducing taxation methods available to the states.<sup>330</sup> On the other hand, the courts' insistence upon solving, in a perspective favouring the protection of individual rights, problems related essentially to structural difficulties inherent to the



sharing of state and federal government revenues, shows the favourable prejudice from which the citizen benefits.<sup>331</sup>

In the same vein, after abandoning the loophole represented by the states' role as a trustee in managing community property as a motive for justifying favouring their constituents with regard to the development of natural resources, the Supreme Court deemed it appropriate to open a new breach enabling a state to avoid the control of the commerce clause when it intervenes as a market participant. Without calling attention to it, the Supreme Court appears to accept that it is not incumbent upon it to criticize such actions at a time when the states are being called upon to assume directly heavier, more immediate economic responsibilities with regard to their constituents, Congress is empowered, in any event, to rectify possible abuses arising from these practices.

With regard to the free movement of persons, the Supreme Court has not hesitated to cite the general orientation of American federalism to affirm the existence of a constitutional guarantee to this effect, in addition to invoking the clause respecting immunities and privileges, the Fifth and Fourteenth Amendments, and the commerce clause.

With a view to influencing state legislative activities, Congress, supported by the courts, has frequently used its spending power to promote numerous social and economic programs. Recently, however, President Reagan's new federalism has renewed the idea of a clear division of responsibilities, with the result that several conditional federal grants are being eliminated. Were this trend to continue, it would result in a restructuring of the American economic union, characterized by a more restrictive vision of the need for common policies. Such a vision seems to go against preoccupations currently animating public debate in Canada.

## **Economic Unions Based on Treaties**

### ***Introduction***

Economic unions based on treaties are particularly useful to look at because the rights and duties of their members, since they are sovereign states, are usually specified more clearly than those of their constitutional law counterparts. Furthermore, since most such unions were formed in the 1950s and later, their development is better documented. In the following pages, we will examine first the European Economic Community which, to date, appears to be the most successful experiment in international economic integration. Later, we will briefly consider the evolution of economic unions in developing countries. Although these unions have often made little progress toward the goals set out in their founding documents, the reasons behind their difficulties demonstrate some perennial problems of such structures.

## *Economic Integration and the European Community*

### IMPLEMENTATION OF THE SYSTEM

Recent political unions have given economic integration far greater significance than those in the past. In terms of primary goals the difference between, for instance, the North American federations and the European Community amounts to this: in the United States and Canada, an economic union was a necessary (and desired) consequence of forming a federation, while in the European Community political and legal institutions were a necessary consequence of forming an economic union.

Certainly, economic considerations played a role in the creation of both North American federations, but the expressed primary object was that of nation building. The preamble to the U.S. Constitution states:

We the people of the United States in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote general welfare, and secure the blessings of liberty. . . .

Although a few of the phrases, like “more perfect union” and “general welfare,” may have an economic connotation, the main purposes of the document seem more broadly political and social.

Discussion of economic powers does not occur until section 8 of article 1, where four of the 18 powers expressly assigned to Congress relate to an economic union. Similarly, in Canada the preamble to the *Constitution Act, 1867* contains few words with an economic import:

Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into One Dominion under the Crown . . . with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces . . .”

It is not until section 91 that economic powers are allocated. In addition to the residuary power and the power to regulate trade and commerce, section 91 enumerates ten further economic powers for the Parliament of Canada in subsections 14 to 23. The list is misleading, however; six of the subjects — currency and coinage, banking, the incorporation of banks and the issue of paper money, savings banks, bills of exchange and promissory notes, interest, and legal tender — are related to the management of the monetary system of the country. Although important, the powers allocated to the central governments of both countries were not the dominant considerations when the constitutions were written.

The removal of trade barriers, erected by the states and provinces before federation, are treated in a similar way in both constitutions. In the American constitution, section 9 of article 1 prohibits export taxes by



the states, and section 10 forbids any state from laying “any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws” without the consent of Congress. In section 2 of article 4, “the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.” Although the list of restraints on state powers is important, it is limited.

In Canada, section 121 of the *Constitution Act* states that “all articles of growth, produce or manufacture of any one of the provinces shall, from and after the union, be admitted free into each of the other provinces,” while sections 121 and 122 deal only with transition provisions. The Canadian list of restraints is thus much shorter than that in the U.S. Constitution.

The constitutional provisions dealing with economic union in each federation are important because they were the basis upon which the legislatures and courts constructed each nation’s economic system. Nonetheless, it is fair to say that the economic unions of the two countries were seen as part and parcel of political unions, as necessary consequences of forming a federation.

By contrast, supporters of federalism within the six original members of the European Coal and Steel Community (ECSC), after having been rebuffed in their explicit attempts to create a political union, concluded that the only feasible path open to them was to concentrate first on economic integration. This shift in emphasis can be seen in comparing the preamble to the ECSC,<sup>332</sup> and especially that of the stillborn European Political Community<sup>333</sup> in 1954, with that of the Treaty of Rome, the “constitution” of the EEC, just three years later, which states:

- Determined to lay the foundations of an ever closer union among the peoples of Europe,
- Resolved to ensure the economic and social progress of their countries by common action to eliminate barriers which divide Europe,
- Affirming as the essential objective of their efforts the constant improvement in the living and working conditions of their peoples,
- Recognizing that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,
- Anxious to strengthen the unity of their economies,
- Desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade.

Thus, both in its original name of European Economic Community (as well as in its colloquial name, the “common market”) and in its stated goals, we can see undisputed primacy given to economic integration.

The Treaty of Rome itself bears out the primacy of economics. The great majority of its 248 articles deal in detail with economic matters. The only sections dealing exclusively with political and legal concerns

are articles 137 to 189; these describe the establishment, composition and functions of the institutions which were to implement the economic union.

When comparing the EEC with the federations of the United States and of Canada, two other distinctions should be kept in mind. First, both North American federations had been colonies within the imperial mercantile system. As such, they were expected to produce the raw materials for the mother country and to take finished goods in exchange. Each could protect its small infant industries from those in adjoining colonies by a system of tariffs, but movement of people and capital between the colonies was relatively free. In fact, it was expected that not only new immigrants but also established colonists in the older colonies would migrate to settle the pioneer areas and create further colonies. At the same time London maintained control over finances and the monetary system. Accordingly, there was little institutional and legal machinery in the colonies to be dismantled on the creation of a federation. The colonists saw their task in designing a constitution as primarily one of creating new political institutions.

By contrast, the designers of the EEC had to contend with existing highly developed and sophisticated systems of economic management maintained by each national government. (Benelux, while representing a partially integrated economic system, itself maintained a developed system as a unit like the other nation states.) It was necessary, therefore, to plan the partial dismantling of a large and complex member-state system of governmental regulation in order to supplant it by a community system.

The second distinction is related to the stage of development of economic life generally in agrarian societies of the mid-18th and 19th centuries compared with mid-20th century industrial societies. It would be inaccurate to characterize the earlier economies in North America as simple and undeveloped. Nevertheless, the populations were relatively small and predominantly rural, and government services and direct intervention in the economy were at relatively low levels. The size of government — the proportion of workers employed by government and of GDP spent by government — was minuscule.

By the mid-20th century, complex transportation and communication patterns, specialized industrial production, multinational enterprises and government intervention had increased dramatically. So too had the influence of the discipline of economics. After the Depression and World War II, governments looked to economic analysis as a basis for policies to meet their problems. Of necessity then, any plan to integrate the economies of western European nations had to be plotted in detail and with great care. The result was the Treaty of Rome. Article 3 of the treaty sets out a detailed development plan, charting the progress of integration in the following order:



- a. the elimination of customs duties and quantitative restrictions between member states;
- b. the establishment of a common customs tariff and a common commercial policy toward third countries;
- c. the abolition of obstacles to freedom of movement for persons, services and capital;
- d. the adoption of a common policy for agriculture;
- e. the adoption of a common policy for transport;
- f. the institution of a system ensuring competition in the market;
- g. the creation of a system of coordination of economic policies of member states, especially to control balance of payments problems;
- h. the approximation of laws to the extent required for the proper functioning of the common market;
- i. the creation of a European Social Fund in order to improve employment opportunities, that is, a system of redistribution of some of the economic benefits in the EEC;
- j. the establishment of a European Investment Bank for similar purposes.

The complexity of the process of economic integration was due not only to the highly developed economies and institutions of the member states, but also to the need to proceed democratically and with minimum hardship to those engaged in the many activities affected.

There are two paradoxes to be noted. First, the smoother the transition, the less attention was drawn to any changes in institutions, and accordingly the less the public was aware of the impact of the EEC; second, changes that did come to public attention were almost always the restrictions and disadvantages resulting from the new regime. The beneficial aspects required responses by the business world; these took time and usually were effected without publicity. Thus the EEC has always faced a dilemma (not unlike that faced by central governments of federations) of trying to keep citizens of member states loyal and informed while fearing the almost inevitable adverse publicity associated with substantial changes in economic rules of the game.

The complex nature and undoubted accomplishments of the integration process are best illustrated by a list of the stages completed since the Treaty of Rome came into force in January 1958:

- 1962, January — Common Agricultural Policy (CAP) goes into effect;
- 1965, April — Merger Treaty, merging the executive institutions of the three communities (Coal and Steel, Euratom, Economic Community);
- 1968, July — customs union within the Community is completed with abolition of internal tariffs and adoption of common external tariff;

- 1969, December — heads of government of member states agree to proceed with economic and monetary union;
- 1971, January — “own resources” system comes into effect whereby the Community raises its own revenue instead of receiving financial contributions — from the member states;
- 1973, January — Denmark, Ireland and the United Kingdom join the Community;
- 1975, July — Second Budgetary Treaty gives the European parliament increased budgetary powers;
- 1979, March — European Monetary System (EMS) is launched with eight members participating but the United Kingdom remaining outside;
- 1981, January — Greece becomes the tenth member state.

Of course, these are the highlights; we have not mentioned the setbacks, nor have we noted any of the specific elements of the integration process — the regulations and directives proposed by the commission and implemented by the council of ministers and landmark decisions of the European Court of Justice — the specifics that have given life and form to the creation of the Community.

Although there is no doubt that the EEC has accomplished a substantial degree of economic integration, there are great difficulties in measuring either the quantity or quality of integration, or in measuring the benefits that may have accrued to its citizens. In fact, there is broad disagreement about such benefits. For instance, in the first ten years of its existence intracommunity trade increased greatly, as did the economies of all the member states. However, the rates of growth of trade for many non-member states, especially those of the much less ambitious European Free Trade Association (EFTA), were generally just as high. We can only speculate about whether the creation of the Community gave such a general boost to trade as to cause the benefits to “spill over” into neighbouring non-members, or whether the general postwar prosperity was the primary force; most likely it was a combination of the two.

A further important issue is whether the benefits of economic expansion were reasonably distributed throughout the Community. What happened to regional disparity during those first ten years? Was the standard of living in southern Italy any closer, say, to that of the region around Hamburg at the end of the period? Two crucial factors tended to increase regional disparity and they remain problems for the Community. The first characteristic is inherent: diverse linguistic, cultural, and religious groups identifiable with a region hinder large-scale migration from poorer regions of high unemployment. Most potential migrants within Europe require a higher level of desperation than the more mobile North American before they will pull up roots to seek a better life in a foreign environment. The second factor is the fiscal power of the European Community itself compared to that of a central government of a federa-



tion such as Canada. Its total revenue is relatively small (about one percent of the GDP of the member states). As a result, it is unable to make large-scale transfers of wealth from richer to poorer regions within its territory. Moreover, most revenues are redistributed by formula under the Common Agricultural Policy. Wealth has therefore been transferred according to agricultural criteria that are divorced from general criteria of standards of living, and some wealthier member states have become net beneficiaries at the expense of poorer ones. Thus the United Kingdom, only seventh in average wealth in the Community, is a net contributor to the Community because of its large purchases of farm products.

The complexity of integration, the imponderable external factors surrounding the early years of the Community's existence, inherent restraints on migration, and the Community's limited fiscal power make any profile of the benefits at various stages of integration, or even a balance sheet of the current state of the Community, a value-laden exercise. For instance, it can be argued that political tensions among the member states have been significantly lowered and the level of international cooperation strengthened since the founding of the Community. On the other hand, the relations of European states outside the Community such as Austria, Portugal, Spain and Sweden have also been satisfactory, both with each other and with its members. Many observers would attribute such improved relations in Europe to the lessons of World War II rather than to the influence of the Community, which is itself largely a result of the war.

Accordingly, for the Community to serve as an example of what can be achieved through economic integration, it is best to examine specific aspects of that process, such as the freedom of movement of goods and services. It may also be useful to describe, in terms of current economic concepts, the level of integration accomplished at a specific time without attempting to measure the benefits achieved.

The free movement of goods provides us with a good example of the difficulties of dismantling a system of local market protection. Tariffs and quantitative restrictions are the most visible barriers and may truly be seen as the front line of defence. These were the first to be removed progressively by the Community. As these barriers dissolved, however, the second line of defence assumed greater importance. Pressure brought to bear by special interest groups on their national governments led to the maintenance or increase of other protectionist measures based, for instance, on health and safety standards, labelling and packaging requirements, or frontier inspection charges. Government procurement policies and practices are another source of protectionism.

In Canada, where provincial governments cannot erect tariffs, we are familiar with this second line of protectionism. The provisions are particularly difficult to deal with because, unlike tariffs and quantitative restrictions, they can and often do have a legitimate function apart from forming a barrier to trade. No one would seriously object to stringent

standards for new pharmaceutical products, regulations against adulteration of food, or safety standards for motor vehicles. Yet we also know that such regulations can be and are used to block the entry of competitive goods from other jurisdictions.

The European Community has coped with the problem much as a federation would. It has passed regulations to supersede the national law of member states in areas within its direct jurisdiction. In areas where diversity in member state legal systems is large, it has passed directives requiring members to bring their domestic laws into line with established Community policy. Individual complainants, other member states, and the Community's executive itself have sued before the Community's Court of Justice to require compliance by offending members. On the whole, the system has been successful. There are, of course, cases of evasion, and even one or two examples of outright defiance that might not be countenanced in a federation,<sup>334</sup> but compliance is perhaps little different from that of provinces in the Canadian federation.

Some ingenious devices have been used to maintain a market advantage for domestic goods. For instance, a heavy consumption tax on wine but a relatively lower one on beer may seem to be merely a product differentiation policy to encourage the sale of beverages with lower alcohol content; but, if the member state with this policy happens to be a large producer of beer and has virtually no domestic wine industry, the effect will be to promote the local product at the expense of that imported from other member states.<sup>335</sup> Canadians familiar with the tactics of provincial government marketing monopolies in alcoholic beverages should not be surprised by the use of these devices within the European Community.

The Community approach to such problems has been a sound one. There will always be a need for monitoring and supervision of a customs union by a central agency; there will also be a need to permit aggrieved parties to complain before an appropriate court. If there is a lesson in this system for Canada, it is that we need a similar system to deal with the provincial protectionism that has grown up within our federation. That is not to say that provincial diversity and local needs do not need some protection, but any protection must be articulated, defended and able to withstand testing against developed criteria. The modern, comprehensive expression of goals and policy in the Treaty of Rome has helped the Community to cope with these difficult issues; it is important that we in Canada develop criteria and a framework for ourselves. We must also face the question of the most appropriate institution to manage these issues, regardless of whether it be an existing or a new forum.

A major difficulty for the Community is the *de facto* requirement of unanimity on all important issues that go before the council of ministers.<sup>336</sup> Although this precondition causes less difficulty in areas of "negative integration," such as the removal of obstacles to trade, in areas of more positive integration, such as the formation of the Common



Agricultural Policy (CAP) with a complex system of support prices and transfer payments for agricultural products, the unanimity rule has made continual crisis endemic to the system. From the first agreement on the CAP in 1962, several of the major actors have practised brinkmanship. To avoid being in breach of the treaty's timetable, the council of ministers indulged in the ingenious fiction of "stopping the clock" until agreement was reached and then backdating the agreement to comply with the treaty.

An observer might well wonder why the unanimity rule has not led to paralysis in such a crucial area as agricultural policy. After all, successful agreement the first time was no guarantee of continuing success. The answer seems to lie in the fact that when the CAP came into force in 1962 control was transferred from the governments of the member states to the council of ministers of the Community. If no agreement is reached on a particular item, the pricing and policy arrangements of the current year continue in force.<sup>337</sup> In the volatile world agricultural market, with almost continuous inflation at work and a complicated interaction between currencies, world prices, and guaranteed support prices for the principal products of Community members, it was impossible — as a practical matter — for most members to live with the previous year's prices in the coming year. Demonstrations by groups of farmers, frequently leading to violence, have been a spectre haunting the agriculture ministers in their negotiations.

In these circumstances the pressure for reaching some kind of compromise is almost overwhelming. Whether it is a sustainable system for the future is certainly open to question. At the least, it seems to have undesirable consequences in terms of the relations among member state governments. It has given the Community a model of positive macroeconomic policy making within the Community, one that has continued to work despite the requirement for unanimity, but at substantial costs in terms of good will.

In Canada, a striking example of compromise was the revision of the Constitution, an example in which the process failed in its attempt to gain unanimous approval. This failure has left us with a serious problem of legitimacy, at least for Quebec; it suggests that a similar problem awaits the Community, should it suffer a breakdown of the CAP.

Perhaps a more apt, if less spectacular, parallel may be found in the federal-provincial conferences on specific economic and fiscal arrangements that were regular fixtures in the 1960s and 1970s. Those irregular meetings of the first ministers were analogous to the meetings of the Community's council of ministers. They lacked, however, the important infrastructure provided by the permanent delegations of the member states stationed in Brussels, the large, permanent secretariat of senior civil servants attached to the council, and the ongoing dialogue with the commission.

In the Community system, the infrastructure overcomes in part the

difficulties created by the requirement of unanimity. By contrast, in Canada we have the perils of unanimity in executive federalism with little or none of the ameliorative elements present in the Community. Here again, there may be some lessons for us. Whatever mechanism we decide upon to resolve federal-provincial issues — whether a modified senate or a new intergovernmental agency — we need to create an ongoing system of consultation, one where continuity and expertise moderate the political process and help bring the parties closer to agreement before the political leaders commit themselves to closing the remaining gap.

## BASIC STRUCTURE AND RECENT DEVELOPMENTS

Apart from the process of establishing a common tariff for the European Community, economic union has been approached along four broad avenues: removing barriers to the free movement of goods, persons, services, and capital; establishing a regime of fair competition; harmonizing national legislation; and adopting common policies in certain areas. Interestingly, the degree of success in each of these areas appears to decrease from the first to the last, that is with the passage from negative integration (elimination of obstacles) to positive integration (adoption of common policies).

### *Removing Barriers*

To allow the free movement of goods, the treaty provided for the gradual elimination, between member states, of tariff duties and taxes having an effect equivalent to tariffs, and prohibited quantitative restrictions (quotas) and other such measures. The elimination of tariff duties, as such, was realized well within the ten-year period envisaged by the treaty. As for taxes with equivalent effects, the tendency of the commission and the court has been to interpret them very broadly as including any charge likely to affect the free movement of goods, in even a minor way. The same holds true for measures with an equivalent effect to quantitative restrictions, about which the court declared in 1974:

Toute réglementation commerciale des États membres susceptible d'entraver directement ou indirectement, actuellement ou potentiellement, le commerce intra-communautaire est à considérer comme mesure d'effet équivalent à des restrictions quantitatives.<sup>338</sup>

Article 36 of the treaty allows for exceptions to the principle of free movement when measures are justified by reasons of public morality, public order, public security and health considerations, but the court has consistently defined in a narrow and rigorous way the conditions under which these are granted. Thus, in 1975, in the *Adrian de Peijper* case, it stated that “une réglementation ou pratique nationale ayant, ou étant



susceptible d'avoir, un effet restrictif sur les importations . . . n'est compatible avec le Traité que pour autant qu'elle est nécessaire aux fins d'une protection efficace de la santé et de la vie des personnes"; and it went on to say: "Une telle réglementation ou pratique ne bénéficie donc pas de la dérogation de l'article 36 du Traité CEE lorsque la santé et la vie des personnes peuvent être protégées de manière aussi efficace par des mesures moins restrictives des échanges intracommunautaires."<sup>339</sup> As a result, measures having an "equivalent effect" have been discerned and prohibited in recent years in such areas as phytosanitary control, taxation of alcoholic beverages and restrictions on advertising such beverages when it discriminates against imports, "buy national" campaigns, styles of packaging, and even subsidies. Identifying and obtaining rulings on such effects has not always been easy. The important *Cassis de Dijon* case showed that national laws applying equally to domestic and imported products may nevertheless discriminate against the latter.<sup>340</sup> Other cases, notably *Robertson*, revealed the difficulties of assuring non-discrimination without requiring the court to rule on every detail of national legislation.<sup>341</sup> By and large, however, the European Community has been quite successful in eliminating non-tariff barriers between member states, certainly more so than Canada.<sup>342</sup>

To allow the free movement of persons and services, the treaty calls for the elimination of all obstacles based on nationality and establishes a procedure for determining such obstacles. The only exception to the principle of free movement concerns public services and national regulations justified by reasons of public order, health and security. In accordance with the treaty, a general program specifies first the various types of legislative, regulatory and administrative measures considered incompatible with the free movement of persons and services. Beyond this, specific interventions of the Community — in the form of directives — deal with particular sectors of activities, individual trades and individual obstacles.<sup>343</sup>

In many instances, the court itself has intervened to interpret the obligations of member states under the treaty and under the implementing rules adopted by the European Community. Thus, in 1974, in the *Reyners* case, the court established that all Community nationals who desired to establish themselves in a country other than their country of origin should benefit from equality of treatment with the nationals of their chosen country.<sup>344</sup> The same year, in the *Van Binsbergen* case, the court decided that nationals of the community could not be prevented from selling their services within a member state's territory whether or not they were residents of that state.<sup>345</sup> The *Belgium* case, in 1979 raised a definitional as well as jurisdictional problem:<sup>346</sup> the treaty excludes public services from the provision for free movement, but what is the "public service" and who defines it? Member states have been conceded the right of definition although the court has succeeded in narrowing it

somewhat. In the *Levin* case in 1981, it was established that the Community, not national law, was to define who was a “worker” and therefore able to take advantage of the provisions for freedom of movement.<sup>347</sup> In two cases concerning public morality, the court also succeeded in clarifying the limits under which governments may expel foreign workers.

On the whole, the Community has respected the principle of free movement of persons and services, although many problems remain. In a sense, it has gone further in attacking these problems than has Canada itself, partly because our common nationality for a long time hid the fact that they existed. Now that these problems have been recognized, Canada should realize that many have already been examined in the context of the European Community, and that perhaps this country can learn from that experience.

The treaty also provides for the free movement of capital. But this principle, enunciated in article 3c. is somewhat weakened by the provision of article 67 which states that only current payments are to be liberated without restrictions at the end of the transitional period. Other impediments are to be eliminated only to the extent necessary for the effective functioning of the common market. In 1960, a directive was adopted that provided for an annual examination of remaining obstacles in the rules and practices of financial establishments,<sup>348</sup> but since then there have been no important developments in free movement of capital. Pressure does seem to be building in the mid-1980s, however, for some sort of agreement on the liberalization of various services. Britain in particular has been urging freer movement in insurance, banking and financial services, but progress has been slow. By contrast, the exclusive jurisdiction of Parliament over money and banking in Canada, coupled with the high degree of interprovincial harmonization in insurance and securities regulation and the availability of foreign capital, have largely secured a free flow of capital within the country.

### *Establishing Fair Competition*

The second approach of the Treaty of Rome in the endeavour to implement an economic union relates to the development of effective competition. This approach is in itself interesting because it reflects one of the treaty’s objectives: to link the development of the common market not only to the conduct of the member states but also to that of private business. Article 85 declares incompatible with the common market — and accordingly prohibits — all kinds of agreements between firms that may affect trade between member states and that are intended to restrict competition between firms. Article 86 similarly prohibits abuse by one or more firms of a dominant market position. Such is also the interpretation of Judge T. Koopmans of the Court of Justice of the European Communities who, in 1980, said on the subject:



In other words: Articles 85 and 86 have the side-effect of forbidding private companies to impose restrictions on trade of a kind that would not be allowed from public authorities by virtue of Articles 9–36, such as import duties, quantitative restrictions and comparable trade barriers at the frontier. . . .

What it comes down to is that private enterprise is not allowed to partition the common market by artificial barriers.<sup>349</sup>

Thus, although there are various schools of thought about the capacity of anti-trust legislation to ensure so-called fair competition between firms and to prevent excessive concentration, the distinguishing characteristic of competition policy in the European Community is that it is seen first and foremost as a tool of economic integration. From that perspective it appears to have been fairly successful, as is evidenced by the large numbers of interventions of the commission and the court striking down reciprocal exclusive-dealing agreements, agreements on market sharing, the fixing of production or sales quotas and of prices, as well as various practices which amount to “an abuse of a dominant position.”<sup>350</sup> By contrast, Canadian anti-combines policy is generally seen as having had a dismal record, for reasons that range from the absence of a real political will to invigorate competition to a tradition of judicial ignorance of economics, but with the main blame being put on the legislators themselves and the constitutional division of powers. However that may be, it is clear that Canadian competition policy has never been considered a tool of economic integration. There may be good reasons for this, such as the more advanced stage of integration realized in Canada, but to the extent that the present functioning of the Canadian economic union may be criticized, similar criticism should be addressed to how our competition policy functions.

### *Harmonizing Legislation*

The third approach used in implementing the economic union has to do with the harmonization of national legislation. Under article 3b of the treaty, “the approximation of national legislation to the extent necessary for the functioning of the common market” is set out as a specific goal of the Community. This theme recurs in various articles of the treaty through use of such terms as “approximation,” “coordination,” and “harmonization.” According to Alex Easson, “a number of scholars have debated whether any significance should be attached to the precise term adopted in the Treaty, i.e., whether there exists a hierarchy of assimilation norms. Although the European Court has not yet been called upon to rule on this question, it seems that such a view must be rejected.”<sup>351</sup>

The most important general treaty provision concerning harmonization of legislation is article 100, which states: “The Council, acting by means of a unanimous vote on a proposal of the Commission, shall issue

directives for harmonizing such legislative and administrative provisions of the member States as have a direct incidence on the establishment or functioning of the common market.” A number of other articles go on to deal with harmonization in specific fields such as taxation, export subsidies and so on. The instrument usually prescribed for the task of harmonization, the “directive,” binds each member state to achieve the result desired but leaves the choice of form and methods to the national authorities. Other instruments, such as decisions and recommendations, are also used occasionally.

The best known achievement of the European Community in the field of harmonization of national legislation is the adoption by all member states of a value-added tax system. Important progress has also been made in food regulation, pharmaceutical products, veterinary legislation, technical regulations for vehicles, and industrial safety regulations. To give an idea of the importance of the activity of the commission in this area, it has now adopted about two hundred directives for the removal of technical barriers to trade.

In broad terms, however, the most important development of the early 1980s has been the shift in strategy on the part of the commission to stricter enforcement of liberalization provisions of the treaty and less reliance on harmonization by means of directives. Following the *Cassis de Dijon* case,<sup>352</sup> the commission set out for the member states its policy conclusions, based on the case law of the court, as to national measures that involuntarily create barriers to the free movement of goods. In this communication, the commission developed the view that the problems raised could in many instances be adequately dealt with under the court’s principle of mutual acceptance, which states basically that products meeting one country’s standards should be allowed free access to the other markets, provided they “suitably and satisfactorily fulfil the objectives of the importing country.” From there, the commission went on to say that in the future, it would “concentrate on the removal, by harmonization directive, of such national barriers as are still permissible under the case law of the court.”<sup>353</sup> Market forces, apparently, are expected to be more effective than Community attempts to enforce its legislation on member governments. More fundamentally, however, what the commission suggested was a closer link between the judicial process and the legislative process of the Community.

The situation in Canada as regards the harmonization of provincial legislation is quite different. Article 94 of the *Constitution Act, 1867*, which provides for effecting uniformity in provincial legislation by federal enactment with the assent of the provinces, has never been used. Despite the existence of the Uniform Law Conference, voluntary harmonization by the provinces themselves has not been successful, except in a few areas such as insurance. At the judicial level, the traditional distinction made by the Supreme Court between legislation “in relation



to” and legislation “incidentally affecting” has meant in practice that few involuntary obstacles to trade have been struck down and, as a consequence, that no general view has developed of how to approach such barriers in an economic union. Thus, even after 117 years, Canada appears to be lagging behind the European Community in this field.

### *Common Policies*

Finally, we comment on the common policies of the Community. The treaty provides directly and explicitly for such policies only in the fields of agriculture, transportation and external trade. In more general terms, it calls for the coordination of the economic and social policy of member states. However, in its efforts to coordinate the economic policy of its member states, the Community has embarked upon various sectoral policies in such areas as energy, fisheries, monetary policy, the environment, and regional development. These initiatives have frequently raised serious political problems, especially since most decisions require unanimity, either by law or by common agreement of the member states. In certain areas, such as agricultural policy, the search for a consensus has been so unsuccessful that the Community has been forced to adopt what amounts to a “crisis management” approach.

Thus the Community’s endeavours toward common policies have had somewhat varied success. Although agricultural policy remains a constant problem and transport policy has had limited development, external trade policy appears to have functioned satisfactorily.<sup>354</sup> The European Monetary System, which began operating in 1979, has worked better than many observers predicted. Several orderly adjustments of exchange rates took place in the early 1980s, and there were even claims that the discipline of the system had moved members’ policies and performance closer together. However, the commission’s attempt, in March 1982, to strengthen and enlarge the system (among other things by moving to the second phase in creating a European Monetary Fund) did not succeed. Despite much discussion, industrial policy (in the sense of restructuring toward the industries of the future) has not seen much progress at the Community level. One important exception is the launching, in February 1984, of the ESPRIT program of research and development in data processing, automation and fifth-generation computers. EEC funding of this program, which was set up for an initial five years, is to be matched by private industry.

It would be beyond the scope of this paper to give even a summary view of the initiatives undertaken by the commission in other fields. Nevertheless, two observations can be made about the activity of the Community relating to common policies. First, it appears that there has been a tendency to spill over from the fields of activity where the treaty specifically provided for the development of common policies into other areas. Second, the development of such policies has proved to be more

difficult than originally expected. It would seem that, although the member states have accepted a rather broad interpretation of the negative integration clauses of the treaty, they have attempted to make sure that positive integration does not take place against their interests.

### *Economic Unions among Developing Countries*

Attempts to form economic unions among sovereign states have as long a history in the Third World as in Western Europe. In Central America and East Africa, for instance, the idea of economic integration had its roots in either a long-standing myth of unity or an experience of functional cooperation dating back to World War I. In the Caribbean and in British- and French-ruled Africa the first attempts at regional economic integration took place under colonial auspices; these were frequently succeeded after independence by efforts of a similar kind, effectively under the tutelage of the former colonial power. In the 1960s, however, new indigenous schemes for regional economic integration took shape, influenced both by the impressive record of trade liberalization and growth in the European Economic Community and by Latin American doctrines of economic development which preached import substitution and industrial specialization on a regional basis. Since then, regional economic organizations have proliferated throughout the Third World, their character reflecting the evolution of development doctrine from a reliance on trade liberalization toward an emphasis on more *dirigiste* forms of integration aimed at countering external dependence and distributing the costs and benefits more equitably among the partners.<sup>355</sup>

The fortunes of these organizations have varied considerably. Several are clearly little more than institutional shells, whose occasional meetings and reports give an impression of activity from which, in fact, nothing of importance emerges. Others appear to be making slow but solid progress, often modifying both goals and methods as they go. Certainly there are no spectacular successes; nor, however, are there many instances of outright failure where a regional organization has quietly been laid to rest.

This accumulated experience is of considerable interest, not only for the effort to find ways in which Third World countries can cooperate to break the seeming deadlock of underdevelopment, but also for our attempts to understand the workings of economic unions based on international law. This section will set out the main juridical and institutional features of some of the more significant organizations promoting regional economic union among less developed countries. We shall then attempt to judge how far they have progressed toward their stated objectives. Finally, we shall put forward a number of possible explanations for this pattern of performance, in the hope of shedding some light on broader questions concerning the nature of economic union.



## THE TREATIES: AIMS AND INSTITUTIONS

The following list gives the principal organizations whose experience will be analyzed in this section. For each, the full title is set out, followed by the accepted acronym, the membership and the founding treaty.

- Latin American Free Trade Association (LAFTA): 10 South American states and Mexico; Treaty of Montevideo, 1960. Transformed by new Treaty of Montevideo, 1980 into Latin American Integration Association (LAIA).
- Central American Common Market (CACM): 5 Central American states; treaties of Tegucigalpa, 1958, and Managua, 1960.
- Andean Common Market (ANCOM): Colombia, Peru, Ecuador, Bolivia, Venezuela. Chile withdrew 1976. Cartagena Agreement, 1969.
- Caribbean Free Trade Area (CARIFTA): 10 English-speaking Caribbean states; Treaty of Georgetown, 1968. Transformed into Caribbean Common Market (CARICOM), now 13 members, by Treaty of Chaguaramas, 1973.
- Latin American Economic System (SELA): 23 Latin American and Caribbean states; Treaty of Panama, 1975.
- Association of South-East Asian Nations (ASEAN): Thailand, Singapore, Malaysia, Brunei, Indonesia, Philippines; Treaty of Bangkok, 1967.
- Arab Common Market: 21 members of the League of Arab States; Cairo Agreement, 1964. Successor to stillborn Arab Economic Union, another Arab League project formulated 1957, signed 1962.
- Maghreb association: Morocco, Algeria, Tunisia, occasionally Libya. Various agreements and institutions since 1964.
- East African Community (EAC): Kenya, Uganda, Tanzania; Kampala Agreement, 1967. Successor to East African High Commission and East African Common Services Organization dating from colonial period. Ceased functioning 1977.
- Union douanière et économique de l'Afrique centrale (UDÉAC): Cameroon, Congo, Gabon, Central African Republic, Equatorial Guinea. Chad withdrew 1968. Founded 1964, began operating 1966.
- Union douanière et économique de l'Afrique de l'Ouest (UDÉAO): 7 francophone West African states; founded 1966 and ceased operations 1974.
- Conseil de l'entente: Ivory Coast, Upper Volta, Niger, Benin, Togo; founded 1959.
- Communauté économique de l'Afrique de l'Ouest (CÉAO): Ivory Coast, Upper Volta, Niger, Mali, Senegal, Mauritania; Treaty of Abidjan, 1973. In operation as of 1974.
- Economic Community of West African States (ECOWAS) : all members of CÉAO, plus Togo, Guinea, Benin, Gambia, Sierra Leone, Nigeria, Ghana, Liberia, Guinea-Bissau and Cape Verde; Treaty of Lagos, 1975.

It should be noted that not all these organizations have the same importance for the discussion that follows. If the subject is economic union, there is in fact not much to say about the two Arab groupings, since they have made little progress since their beginnings in 1964.<sup>356</sup> ASEAN and SELA are also peripheral to this analysis since so far they have limited their roles to economic cooperation or coordination, despite their integrative potential. On the other hand, two defunct organizations, EAC and UDÉAO, are included because both their evolution and the manner of their demise are of some interest for our general understanding of Third World economic unions.

Also worthy of comment is the frequent overlapping of membership in the Latin American and African organizations, which often reflects differences in the degree of commitment expressed by various states with respect to integration. ANCOM, for instance, is a subregional group within LAFTA (since 1980 LAIA), whose activities are supposed in turn to be coordinated with those of the Caribbean and Central American organizations by SELA, which embraces them all. Similarly the West African organizational landscape is a complex of interlocking groups (which includes, in addition to those mentioned above, two regional banks and a monetary union involving francophone states) that are now contained, along with five former British and two former Portuguese colonies, in ECOWAS.

The significance of the founding treaty in the genesis and subsequent evolution of each organization varies considerably. In some cases, such as ANCOM or ECOWAS, the centrality of the treaty is evident; its status is undisputed as a point of departure or reference for actions taken within the region. In other cases, however, treaties constitute little more than broad statements of intent, and are vague as to methods and timetables. In addition, treaties must be read in conjunction with other regional agreements that often coexist with them. The essential document of the CACM, for instance, cannot be understood in isolation from the two treaties which preceded it in 1958, the Multilateral Treaty of Free Trade and the Convention on the Regime of Central American Integrative Industries, or from the subsequent agreement to create the Central American Bank for Economic Integration. The same is true of West and Central Africa, where the regional banks, monetary unions and other cooperative arrangements have a direct impact on the working of the various customs unions. In general it is rare to find a Third World regional organization whose basic treaty has the specificity, complexity and centrality that the Treaty of Rome has in the European Community.

There is, of course, great variation in the historical origins and regional circumstances of these projects for economic union, especially between the African groupings, consisting largely of poor, small and new states, marginal to the international system, and the Latin American ones, many of whose members are heavily populated countries with a



considerable industrial base and over 150 years of independent constitutional history. Nevertheless, a few general observations can be made about the aims, institutions and methods of economic integration set out in the founding treaties and other basic documents.

In the first place, all of these projects have the same broad set of objectives. In contrast with the European Community (at least in principle), none of these organizations is directed at the eventual political unification of its region. The purpose, variously expressed, is the economic development of member states through the creation of a regional market, through industrial cooperation, and through some measure of joint economic planning. In some groupings, such as ASEAN and ANCOM, a sense of regional solidarity vis-à-vis outside powers has produced the beginnings of a common foreign policy, but there is no interest (even in regions with some tradition of yearning for political unity, such as the Arab world) in going from this to regional federation. The aim of economic integration is the balanced and harmonious development of the individual sovereign states.

How is this aim to be pursued through regional economic cooperation? In drafting and negotiating treaties to respond to this question, the less developed countries have undergone a significant shift of economic thinking over two decades, influenced by European experience and by a number of setbacks in their own efforts. In the 1950s and 1960s, the example of the EEC, forging ahead in a classic exercise of trade liberalization, or “negative” integration, had a powerful influence on the designers of LAFTA, of the Arab Common Market, and of the customs unions in West and Central Africa. The theory was that the less developed countries could, by forming regional free trade areas or customs unions, counter the deterioration in their terms of trade and their structural weakness in the face of the global economy. The dynamics of a liberalized regional market, in which competitive firms could escape their narrow national confines while weaker firms withered away, were expected to produce increased specialization, efficiency and productivity, and a healthy complementarity among regional industries.

By the late 1960s, however, it had become clear that trade liberalization alone would not ensure this pattern of regional development. To transplant the liberalization doctrine to the Third World — whatever its virtues in Western Europe — was to ignore two significant differences of context. The first of these lay in the pronounced disparities in the levels of industrialization among members of Third World regions. Such disparities meant that the benefits of free trade were shared unevenly, and stress and stalemate quickly emerged among the partners. Treaties drafted from the late 1960s on thus began to incorporate various provisions to redistribute the anticipated costs and benefits of integration more equitably among the participant states. The mechanisms have included: fiscal measures (such as the EAC’s “transfer tax,” in effect a

tariff on imports to the less industrialized members from the more industrialized, permitted temporarily and under certain conditions);<sup>357</sup> common regional funds or banks which give preference to projects in the less developed member states (as in the case of the East African Development Bank and the various West African funds and banks); industrial strategies which distribute regional monopolies among the members (as in CACM and ANCOM); and the concession of less stringent timetables for liberalization to the weaker members (as in the case of ANCOM with Bolivia and Ecuador).

The second difference of context lay in the degree of commercial, financial and technological dependence of these regions on forces in the industrialized world beyond their control. Again, the more recent treaties have included measures of “positive” integration, aimed at the adoption and enforcement of region-wide fiscal and industrial strategies to control direct foreign investment. Especially in ANCOM and CARICOM, a carrot-and-stick approach has been adopted (not without controversy), in which the lure of access to regional resources and tariff-free markets for firms with lower levels of foreign investment is combined with strict rules about reinvestment and repatriation of profits. Along with the concern for a more equitable distribution of benefits, this emphasis on controlling external dependence implies a more *dirigiste* form of integration than was contemplated in the earlier treaties or, indeed, than is practised in the European Community.

Regional economic organizations in the Third World differ considerably in the scope and level of economic competence specified in their founding treaties. With the exception of ASEAN, where the idea of regional free trade was debated and rejected, all have as a minimum objective the formation of a customs union, with free intra-regional trade and a common external tariff. Until 1967, LAFTA was an exception, aimed simply at free trade. Since then its official goal has been a full common market, as reaffirmed by the Montevideo Treaty of 1980 which transformed it into the LAIA.<sup>358</sup> Similarly, after a brief experiment with free trade, the Caribbean states adopted the goal of a customs union in negotiating the CARICOM treaty in 1973. Treaties generally specify a date by which the customs union is to be achieved, and a schedule for reductions of internal tariffs and alignment of external tariffs. Treaties vary in their specificity and stringency regarding products to be included in this process. The 1960 Treaty of Montevideo allowed LAFTA members great latitude in deciding which products went on the “common” list, where reductions were automatic and irreversible, and which went on “national” lists, where reductions had to be negotiated annually and could be rescinded.<sup>359</sup> At the other extreme, the Managua Treaty put the onus on the CACM states to make the case for any product they wished *excluded* from the free trade provisions which were to come into effect after only five years.<sup>360</sup>



Beyond these basic provisions for customs unions, however, there is great variation in how far the different regional groupings propose to go toward full economic union. A number of the more recent treaties envisage a common market in which all factors of production circulate freely. Such provisions have little meaning in a Third World setting as far as capital and services are concerned, and the free movement of labour has proved problematic in CACM and ECOWAS, the two organizations that instituted it. Only rarely does monetary union form part of the regional picture, either as reality or aspiration. It exists in francophone Africa as a consequence of the maintenance of the franc zone, although with obvious consequences for the autonomy of those states. It existed in East Africa for over 50 years, dissolving rather ominously in 1966, one year before the launching of the EAC. In general, as the East African case illustrates, Third World governments have been reluctant to submit the instruments of monetary policy to a common regime, whatever the theoretical attractions of regional solidarity.

These governments have found it more attractive to commit themselves to the looser language of "cooperation," "coordination" and "harmonization" in various areas of policy. The sectors favoured in nearly all treaties include transportation and communication, agriculture and fisheries, energy, and social policy. Treaty provisions, however, rarely go beyond general expressions of good intentions. The only important exception to this pattern has occurred when redistribution and dependency have become political issues threatening the organization's survival, as in CARICOM and ANCOM. The response in such cases has been to formulate a regional industrial strategy that imposes economic sacrifices on some member states and political constraints on all.

The institutions created by the treaties to make and administer policy for the regional economic organizations follow, for the most part, familiar patterns. In almost all cases the supreme organ is a council of the heads of state or of government, meeting infrequently (once a year is normal) to take decisions by consensus or unanimity. Consistent with the purposes of the enterprise, then, there is no element of supranationality, actual or emergent, in policy making. Councils of government ministers tend to be second rank decision-making bodies, meeting regularly to give shape to high-level decisions and to act as chief executive organ in groupings where the administration of policy must rely almost entirely on national bureaucracies. Correspondingly, regional secretariats tend to be technically expert but numerically and politically weak. Parliamentary and judicial institutions like those of the European Community are virtually non-existent.

There are, to be sure, exceptions to these generalizations, the most striking of which are found in ANCOM.<sup>361</sup> That organization combines a commission (in effect, a council of permanent representatives of the member governments), which sets general policy, often by qualified

majority, and a three-man junta, independent of governments and charged with acting in the common interest in proposing and executing policy. In 1979, moreover, the member states agreed to set up a court of justice for ANCOM as well as a directly elected regional parliament, although the latter was not in place in 1985.

Another significant institutional feature of these Third World organizations is the existence of a number of semi-autonomous functional or financial bodies alongside the central organs. These include a variety of technical committees, institutions for research or training, and, perhaps most important, regional banks or similar bodies, such as the Andean Development Corporation (created in 1968, one year before the Cartagena Agreement). This arrangement gives a certain flexibility and durability to the regional organizations; if, as frequently happens, the member states and the central organs are beset by political crises, much of the useful technical and financial work can carry on insulated from the troubles.

## APPLICATIONS AND EFFECTS

An evaluation of these projects of regional economic integration requires, first, an examination of their performance in meeting the specific commitments the members have made toward construction of an economic union, and, second, an assessment — necessarily more speculative — of their impact on the economic development of the states in the region.

As far as trade liberalization is concerned, there is a marked similarity in the records of all these regional organizations, one that is particularly striking in the Latin American cases. In LAFTA, CACM and ANCOM, the first phases of tariff disarmament immediately following signature of the treaty saw a considerable intensification of intra-regional trade (especially in manufactures). Thereafter, although volumes continued to increase, the ratio of intra-regional to total trade virtually ceased to grow. Thus, from 1961 to 1965, intra-LAFTA trade as a proportion of the members' total trade increased from 6 percent to 11.3 percent. In 1970, however, the figure stood at 10.7 percent, and in 1976 at about 11 percent. CACM's ratio of intra-regional trade to total trade went from 6.4 percent in 1960 to 15.6 percent in 1965 (a reflection in part of its bolder method of liberalization); it even approached 20 percent by the late 1960s before declining markedly through the next decade.<sup>362</sup> Finally, ANCOM's ratio almost doubled between 1970 and 1976, from 4 percent to over 7 percent. These figures understate ANCOM's success, given the huge jump in extra-regional exports represented by the entry of Venezuela in 1973 and the increase in the price of its petroleum exports. Since the late 1970s, in any case, the proportion of intra-regional to total trade appears to have



stabilized here too. In all these examples, then, intra-regional trade, after an initial boost from the reduction or removal of barriers, seems to hit a ceiling (generally below 20 percent) whose level reflects structural constraints determined by the nature of regional manufacturing and markets and by the place of the region in the international economic system.

In the Caribbean and most of the African customs unions the pattern has been much the same: an initial surge of intra-regional trade, a plateau, and then a slight regression. The figures, both positive and negative, are a little less striking in Africa than in Latin America. And the modest increases in intra-regional trade in the Central and West African groupings must be viewed in the context of the weakness and poverty of those national and regional markets relative to the Western European markets which continue to account for the vast proportion of their trade. Not only does intra-regional trade still represent less than 10 percent of the total trade of the francophone African states; in the late 1970s those countries conducted some 50 percent of their total trade with France alone.<sup>363</sup> Although it is still too early to assess the record of ECOWAS, the youngest African customs union, there is little reason to expect that its pattern of intra-regional trade or dependence on European Community markets will prove to be much different.<sup>364</sup>

In all the African and Latin American organizations, trade liberalization almost immediately raised issues of equity in the distribution of benefits. In LAFTA the larger, more industrialized members (Argentina, Brazil and Mexico) seemed to be doing much better out of the process of tariff reductions than were the rest. Five of the disadvantaged states reacted by setting up ANCOM as a "progressive" bloc within LAFTA in which, significantly, they made provisions to protect the two weakest members (Ecuador and Bolivia) from the costs of rapid liberalization. Similar stresses in CARIFTA had much to do with its transformation in 1973 into CARICOM, a more redistributive form,<sup>365</sup> and with the alienation from CACM of its poorest member, Honduras, in the early 1970s.

Dissatisfaction with the distribution of the benefits of free trade was the major economic reason for the collapse of the East African Community. The new measures in the 1967 treaty (the transfer tax and the East African Development Bank) came too little and too late to offset Kenya's domination of regional trade in manufactures.<sup>366</sup> In the francophone West African organizations, there is similar concern about the Ivory Coast (whose government, like Kenya's, takes a liberal approach to foreign investment). In the CÉAO, for instance, the Ivory Coast's GNP is greater than that of all its partners combined, and in per capita terms it is twice that of the next richest member. Here, however, some compensating mechanisms are already in place.<sup>367</sup> The same is true for ECOWAS, dominated by the populous and oil-rich Nigeria. It is noteworthy that the

six members of the CÉAO have resisted merging their organization into that of ECOWAS, to which they all belong, largely because they value it as a means to offset Nigeria's commercial power.<sup>368</sup>

There is, in fact, a continuing political and theoretical debate about the costs and benefits, for economic integration and regional development, of such patterns of dominance. Some argue that successful integration requires a "pole" or a "core" around which lesser economic units cluster and from which they profit; others, working sometimes from different normative positions, argue for more even distribution of economic power. Although there can be as yet no definitive answer, the relative success of ANCOM and the collapse of the EAC give some credibility to the second thesis.

To move from regional free trade toward a full customs union through the adoption of a common external tariff (CET) has proved more difficult than the removal of tariffs within regions. Only in the CACM has this been achieved swiftly and relatively painlessly (by 1967 the CET was about 98 percent in place).<sup>369</sup> In LAFTA, on the other hand, the members' pledge, made in 1967, to move to a full customs union by 1985, was in 1984 still far from being realized despite periodic reaffirmations of the goal. In CARICOM and ANCOM, efforts to fulfil treaty provisions for a CET led to major crises resulting in a dilution of the original commitment. In both cases more industrialized members, confident of their ability to cope with international competition (and sometimes bolstered by neo-liberal economic doctrines), pressed for lower levels of external protection than weaker, less developed members felt able to accept. The bitter dispute in ANCOM over this issue was one factor leading to Chile's departure in 1976. In the end the remaining members agreed on a differentiated schedule whereby the weaker partners, Ecuador and Bolivia, could postpone adopting the common tariff.<sup>370</sup>

The few regional organizations that aim at a full common market embracing the free movement of labour, services and capital, as well as goods, have not yet seen a great deal of success. Free movement of labour is provided for in both the CACM and ECOWAS treaties, but in those regions, as elsewhere in the Third World, such migrations tend to be socially and politically explosive. In Central America there is a long tradition of labour mobility; nevertheless it was the central issue in the so-called "soccer war" of 1969 between Honduras and El Salvador that almost put an end to the CACM. In West Africa, Nigeria's two 1983 expulsions of foreign workers, nearly all from Ghana and other neighbouring countries, have been a severe test for ECOWAS. Free movement of services and right of establishment, however, have as yet little significance in Third World settings. Except where they run counter to controls on foreign investment, these provisions have not raised difficulties.

For less developed regions the problem of capital movement is different from that confronting members of the European Community,



where the question is how to reduce national controls and create an open, integrated Community capital market. In most Third World regions, the primary problem is to attract investment from abroad, using the leverage of regional solidarity to ensure that this investment goes to the optimal locations and sectors, and that it is regulated with respect to reinvestment, repatriation of profits, and other matters on which less developed countries have long been sensitive. Since the main instrument for such regulation has been, directly or indirectly, regional industrial strategy, it would be useful to assess what various organizations have achieved in that area.

The idea that regional industrial strategy would be essential to the success of economic union was, not surprisingly, pioneered in Latin America. The objective of a rational and equitable distribution of major industries appears in LAFTA's provision for "complementarity agreements"; except for the chemical and electrical industries, however, little has been accomplished in terms of regionally based, integrated systems of production.<sup>371</sup> On this score, CACM again attempted a bold approach. Its Regime for Integration Industries proposed a licensing arrangement which in effect guaranteed a monopoly of the regional market for ten years to manufacturing companies willing to respect CACM rules concerning price, quality and local equity participation. Opposed from the outset by American business and government, as well as by international lending agencies, the regime was never fully established. Since 1970 it has been virtually defunct.<sup>372</sup>

It is ANCOM that has developed the most sophisticated form of regional industrial strategy, again subject to considerable local resistance and foreign hostility. As elsewhere, the goal here has been greater specialization and diversification of regional industrial production through a rationally planned and regulated division of labour throughout the Andean area. One aspect of the policy is to promote consultation among member states over the "rationalization" of existing industrial structures and the harmonization of investment plans in these sectors. In fact, this bland language covers difficult choices and hard bargaining, and the record so far is uneven. A second aspect is the "sectoral development programs," which envisage the creation of equitably dispersed regional industries in several sectors where the Andean countries are believed to have the best chance of replacing imports with indigenous production. Thus far, programs have gone ahead in three sectors (machines and machine tools, 1972; petrochemicals, 1975; and automobiles, 1977) through a combination of tax concessions and grants.<sup>373</sup> This scheme has been emulated in CARICOM, where the attempt failed for lack of consensus among the major states, and in ASEAN, which has been putting into place a system of "ASEAN industrial enterprises" distributed among the members and benefiting from regional tariff preferences.<sup>374</sup>

ANCOM has also regulated foreign investment more directly, through instruments that exclude it from some sectors entirely (banks, transportation, communications), restrict it to less than 20 percent participation in others ("national" industries), and to less than 50 percent in a third category ("mixed" enterprises). In its landmark Decision 24 of 1970, ANCOM provided for the transition of foreign-owned firms (i.e., over 50 percent) to one of these three categories over a 15- to 20-year period; without this status they would be unable to operate free of tariffs in the Andean region. Other rules concerned reinvestment of profits and their rate of repatriation to the investor's home country (limited at first to 14 percent and later to 20 percent annually of invested capital). Under intense American pressure as well as the open defiance of the Chilean government after 1973, some of these provisions were modified.<sup>375</sup> The framework, however, is still in place and, although it may have deterred some investors early on, most appear willing to live with it. It is worth noting that in drafting the LAIA treaty of 1980 the other South American countries and Mexico adopted a similar program based on an identical classification of enterprises.<sup>376</sup>

It should be evident that regional industrial strategies of this kind build in a strong redistributive element, directed at the investment decisions of both local and foreign-owned enterprises. The concern of most Third World regional organizations to achieve a more equitable pattern of industrial development among their members is also reflected in the widespread presence of regional banks or funds to channel both local and foreign resources into poorer parts of the region. After uncertain beginnings, the Central American Bank for Economic Integration and the Andean Development Corporation have been able to attract foreign capital and have played a significant part in stimulating new industrial growth through technical and financial aid programs. The francophone African groupings are also equipped with such instruments: the Banque des états d'Afrique centrale (BÉAC) for UDÉAC, the Fonds commun de développement, which serves CÉAO; and the Banque Ouest-africaine de développement, for six members of ECOWAS. The impact of these agencies has tended to be limited by a chronic shortage of indigenous capital. In addition, outside contributors, such as the United States in Latin America and France in Africa, are suspected of attempting to use financial leverage to impose their own developmental priorities on the regions.

Beyond this, there are some concrete accomplishments to point to in certain regional organizations on the level of functional and administrative cooperation. In Central America, the Andean group, CÉAO, ECOWAS and ASEAN, considerable progress has been made in coordinating and even harmonizing fiscal and general economic policy, and in developing collective solutions to the critical regional problems of food (agriculture and fisheries), energy and transportation. None of these



organizations, however, approaches the degree of functional integration reached in East Africa under the Common Services Organization which preceded the EAC and whose legacy dissolved with that ill-fated body. In general, the higher stages of economic union, beyond the customs union, remain to be conquered in nearly all the cases studied, and it is not easy under present conditions to be optimistic about the prospects.

## Conclusion

It has been argued by A.H. Birch that federalism as a concept has no fixed meaning: its meaning in any particular study is defined by students in a manner determined by the approach they wish to make to their material. The same remark might be made about the concept of economic union. From an economic point of view, the concept is generally understood to refer to a stage of economic integration that stands midway between a common market and full economic integration. From a political point of view, it is seen as a powerful argument for bringing diverse political communities together, and keeping them together. And legally, it refers to a set of institutional and normative rules that ensure the substantial elimination of barriers to the free movement of goods, persons, services and capital between participating states and grant to central institutions powers to manage the economy in key areas. In the final analysis, however, an economic union, whether it is based on international or constitutional law, has to adjust to a variety of political, social and economic factors, and its ultimate performance will be a function of its recognition of these factors. Thus, in some circumstances, a more integrated economic union may prove less efficient than a less integrated one.

In these conditions, it becomes all the more important to have a good understanding of the various legal instruments that can be used to create and develop of an economic union. In this respect, the first conclusion that comes out of our study is that a fundamental distinction must be made between negative and positive integration.

It is in negative integration, understood here to mean the elimination of obstacles to the free movement of goods, persons, services and capital, that most of the gains from economic integration are realized. For its implementation, negative integration relies on legal mechanisms that take the form either of a statement of principle in the constitution regarding freedom of trade among member states, or a division of powers in the constitution that directly or indirectly prevents member states from interfering with such freedom, coupled in both cases with an active participation of the courts in the enforcement of these constitutional rules. The choice of a principle or a division-of-powers approach in the constitution is not entirely indifferent, the former being somewhat less favourable to government interventionism than the latter. In prac-

tice, however, the decisive factor in ensuring the free movement of goods, persons, services and capital will rest with the capacity of the courts to develop a sound economic understanding of the problems brought before them. Thus, despite the fact that both Canada and the United States have relied essentially on a division-of-powers approach, whereas Australia and the EEC have taken a principle approach, the best results appear to have been attained in the United States and the EEC, owing to the economic rather than exclusively legal reasoning of their courts.

However, the difference in results may be explained by another factor. Through different legal devices, both the United States and the EEC ensure real participation of their member states in the adoption of common policies. In the United States, this is done through the Senate, and, in the EEC, through the council, both being strong institutions that actively represent member states' interests. In Canada and Australia, by contrast, the parliamentary system of government has prevented the second chamber from playing an active role in the definition of common policies. In the end, it appears that the success of negative integration is conditioned to some extent by the degree of confidence member states have that their interests will seriously be considered in the formulation of central policies. Or, to put it differently, negative integration can be successful only to the extent that it covers interventions by both member states and the central government.

Negative integration cannot be totally successful if it does not take into consideration the conduct of the private sector. Businessmen can hamper, delay or limit economic integration and the process of adjustment that it involves through agreements restricting competition between firms, or through abuse of a dominant position. In this respect the European Community has developed a strong competition policy as an essential complement to its rules on the free movement of goods. The same can also be said of the United States, but certainly not of Canada.

A last problem worth mentioning in relation to negative integration has to do with disparities in the economic legislation of member states. It is interesting to note that in the European Community, and to a lesser extent in the United States, harmonization of legislation has been a matter of practical concern, whereas in Canada and Australia it remains largely a subject of academic discussion. In the Community, harmonization of legislation is not seen as an end in itself, but serves specific purposes, i.e., the establishment and operation of the common market and the creation of similar conditions of competition. At some point, however, efforts to harmonize national legislation may become a disguised form of central intervention, or an indirect method of expanding the field of common policies. This, indeed, may explain the recent tendency in the European Community to slow down the harmonization process.



Positive integration, that is the elaboration and implementation of common policies, has a much greater political connotation. As the economic gains to be derived from further integration diminish, the political options increase considerably. As it becomes more difficult to reach a consensus, a natural tendency to expand the powers of the central institutions develops. But whatever the division of powers, a crucial problem arises with respect to the redistribution of the benefits from economic integration. Here, an important lesson can be learned from the experience of economic unions in developing countries: somehow, the benefits from an economic union must be shared among the participating states. Indeed, the underlying assumption of such an institutional framework is that it brings benefit to all member states. When this does not happen and one or more regions feel left out, tensions appear and, in a context where the member states retain their sovereignty, the resulting political problems can lead to the dismemberment of the economic union. Even if it can be demonstrated that in a well-functioning economic union new opportunities are created in certain areas that benefit the residents of other regions, tensions will continue to exist, if only because the governments of the less favoured regions will consider their own legitimacy threatened.

Unfortunately, there is no easy answer to this problem of winners and losers. One option is to push ahead with economic integration and not to be concerned excessively with the reaction of the member states, relying on labour mobility to redistribute the benefits of economic integration among individuals. Legally, this speaks in favour of affirming, in the constitution, the principle of the free movement of labour, together with a strong implementation of this principle by the courts. But this can only work to the extent that the individuals themselves are ready to move to areas where the jobs are. Another option is to try to redistribute the jobs through regional development policies. This generally involves the use of the spending power, directly or in concert with the member states, through the device of intergovernmental agreements. The efficiency of such an approach, however, remains unproved. Some would even argue that it simply diminishes the benefits from economic union. A third option is to provide the member states with greater financial autonomy and let them decide their priorities in a responsible way. This is the approach that has been developed recently in the United States and Australia. The results so far are not clearly positive or negative, but in fact they may favour the richer states in the long run. Whichever approach is used, the success of any economic union will in the last resort often rest on an appropriate redistribution of benefits.

Finally, we consider the mechanisms for linking the double processes of negative and positive integration. There are no generally accepted formulas for designing them or putting them in place: the mechanisms in question will vary according to circumstance and will almost certainly

evolve over time. However, when economic adjustment leads to uncertainty and perpetual conflict, as appears to be the case in Canada, the union should be reassessed with a view to reaching a greater degree of efficiency.

As noted above, successful integration requires, first, an institutional mechanism that will guarantee to the member states that their commitment to the free movement of goods and factors of production will be matched by a similar commitment by the central government. Second, to the extent that a certain degree of control must be exercised over the legislative and administrative interventions of the various governments, such control must take into consideration not only their constitutionality in a formal legal sense, but also their appropriateness in economic and political terms. It is interesting to note, on the latter point, the view expressed in 1939 by the Rowell-Sirois Commission:

The elaboration, by a court, of strict and binding rules on such matters as these might in practice prevent the enactment of useful provincial legislation and might in destroying one type of abuse create shelter for other and even worse abuses. And it is doubtful whether the personnel best suited for purely judicial functions is likely to be the personnel best suited for dealing with somewhat technical questions of economics and business.<sup>377</sup>

Since our parliamentary system of government does not easily allow for a powerful second chamber that represents provincial interests and since our judicial tradition, grounded on the principle of *stare decisis*, leaves little room for economic and political analysis, one is led to the conclusion that our present constitutional/judicial approach to economic integration should be somewhat downplayed in favour of the type of mechanisms found in GATT. What this means essentially is that, while acknowledging the role of law as the ultimate test for judging the conduct of the provincial and federal governments, greater use should be made of such techniques as consultation, negotiation, fact-finding, and conciliation, techniques that are essentially intergovernmental in nature, to promote the goals of economic integration. If the economic union is to become a dynamic instrument of economic development, it must rest on improved legal and institutional arrangements that ensure the adherence of all governments to a common set of principles and promote at the same time their active participation in the implementation of these principles.

Here again, it is interesting to note that the *Report* of the Rowell-Sirois Commission in 1939 included fairly detailed suggestions along these lines, ranging from a dominion-provincial conference to a specialized tribunal to an intergovernmental agreement. The *Report* itself did not take a position as to the most appropriate solution, leaving that to an eventual dominion-provincial conference to decide. But in today's circumstances, one would expect the report of a Royal Commission on the



Economic Union and Development Prospects for Canada to include specific proposals on this question very much along similar lines.

## Notes

This study was completed in March 1985. The sections on Canada, the United States and Australia have been translated from the French. The writing of this report has been a collective responsibility. However, the allocation of the primary responsibility for writing the report was as follows: Bernier, Canada and the EEC; Roy, Australia and the United States; Pentland: developing countries and the EEC; Soberman, the EEC. The authors wish to thank Mark Krasnick and Nola Silzer for helpful comments on a draft of this study.

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7. Jacques Van Esch, "How Relevant Are Economic Integration Effects?" in *Essays in European Law and Integration*, edited by D. O'Keeffe and H.G. Schermerf (Anvers: Kluwer-Deventer, 1982).
8. W.H. Riker, *Federalism: Origin, Operation and Significance* (Boston: Little, Brown, 1964).
9. It is to be noted that the general principle outlined in section 30 of the treaty establishing the European Economic Community stipulating that "quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States" does not prohibit member states, under section 36 of the treaty, from adopting " . . . prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."
10. Kenneth Wiltshire, "Working with Intergovernmental Agreement — The Canadian and Australian Experience" (1980), 23 *Canadian Public Administration* 353.
11. *Gold Seal Ltd. v. Dominion Express Co. and A.-G. Alberta* (1921), 62 S.C.R. 424. On the division of powers in the Canadian Constitution, see in general, I. Bernier, *infra*, note 60.
12. *A.-G. British Columbia v. McDonald Murphy Lumber Co.*, [1930] C.A. 357; *Texada Mines v. A.-G. British Columbia*, [1960] S.C.R. 713.
13. [1958] S.C.R. 626, p. 642; this point of view had already been presented in 1921 by Mr. Justice Mignault in the *Gold Seal* decision, *supra*, n. 11, p. 470.
14. *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, pp. 1267 and 1268. This viewpoint, supported by four of nine justices, was ignored by the others.
15. *Lawson v. Interior Tree Fruit and Vegetable Committee*, [1931] S.C.R. 357.
16. *A.-G. Manitoba v. Manitoba Egg and Poultry Association*, [1971] S.C.R. 689, p. 723.

17. [1968] S.C.R. 238.
18. (1969), 6 D.L.R. (3d) 225, p. 226.
19. *Labatt Breweries of Canada Ltd. v. A.-G. Canada*, [1980] 1 S.C.R. 914; *Dominion Stores Ltd. v. R.*, [1980] 1 S.C.R. 844.
20. Jean Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Minister of Supply and Services Canada, 1980), p. 23.
21. *Ibid.*, p. 21.
22. *A.-G. Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, p. 268.
23. *Supra*, n. 14, p. 1267.
24. [1971] S.C.R. 543.
25. [1936] S.C.R. 427, p. 457. According to the authors, the federal government's spending power rests on one or other of sections 91(1)a, 102 and 106 of the Constitution and on the Crown's prerogative to spend the amounts collected as it sees fit. See Jacques Dupont, "Le pouvoir de dépenser du gouvernement fédéral: A Dead Issue?" (1967) *University of British Columbia Law Review/Cahiers de droit* 69, p. 75; G.V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2d ed. (Toronto: Canadian Tax Foundation, 1981), pp. 45–46; E.A. Driedger, "The Spending Power" (1981), 7 *Queen's Law Journal* 124, p. 126.
26. *A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 355, p. 366.
27. *In re: Employment and Social Insurance Act*, *supra*, n. 25, p. 434. On the provinces' spending power see Driedger, *supra*, n. 25.
28. La Forest, *supra*, n. 25, p. 75.
29. (1984) 33 Sask. R. 193.
30. A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974), p. 20.
31. [1925] C.A. 396.
32. See, for example, *A.-G. Canada v. A.-G. Ontario*, [1937] A.C. 326; *A.-G. Canada v. A.-G. Ontario*, [1937] A.C. 207.
33. *A.-G. Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (Jabour case); *Re Imrie*, [1972] 3 O.R. 275; *R. v. Buzunis*, [1972] 4 W.W.R. 337; *Dickenson and Law Society of Alberta*, (1978) 84 D.L.R. (3d) 189.
34. See, for example, *Minimum Wage Board v. Bell Telephone Co.*, [1966] S.C.R. 767; *Canadian National Railway Company v. Board of Commissioners of Public Utilities*, [1976] 2 S.C.R. 112.
35. For a recent review of jurisprudence on the question, see the *Canadian Indemnity Co. v. A.-G. British Columbia*, [1977] 2 S.C.R. 504.
36. *Re Upper Churchill Water Rights Reversion Act* (1984), 53 N.R. 268, pp. 294–304.
37. *John Deere Plow Co. v. Wharton*, [1915] C.A. 330; *A.-G. Manitoba v. A.-G. Canada*, [1929] C.A. 260.
38. *Lymburn v. Maryland*, [1932] C.A. 318.
39. [1916] 1 C.A. 566.
40. See P.W. Hogg, "The Constitutionality of Federal Regulation of Mutual Funds," in J.C. Baillie and W.M.H. Grover (eds.), *Proposals for a Mutual Fund Law for Canada*, vol. 1 (Ottawa: Information Canada, 1974), p. 84.
41. *R. v. W. McKenzie Securities Ltd.*, [1966] 56 D.L.R. (2nd) 56.
42. *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, p. 920.
43. *Morgan v. A.-G. Prince Edward Island*, [1976] 2 S.C.R. 349.
44. See P.N. McDonald, "The B.N.A. Act and the Near Bank Case Study in Federalism" (1972), 10 *Alberta Law Review* 155, and the Supreme Court's decision in *Canadian Pioneer Management Limited v. Saskatchewan Industrial Relations Board*, [1980] 1 S.C.R. 433.
45. *Reference re Alberta Statutes*, [1938] S.C.R. 100.
46. *A.-G. Alberta v. A.-G. Canada*, [1939] C.A. 117.



47. *Supra*, n. 43, p. 364.
48. Pierre Fréchette, "L'économie de la Confédération : un point de vue québécois" (1977), 3 *Analyse de politiques* 431, p. 432.
49. John C. Pattison, "Dividing the Power to Regulate," in *Canadian Confederation at the Crossroads* (Vancouver: Fraser Institute, 1978), p. 110.
50. *A.-G. Canada v. A.-G. Ontario*, [1937] C.A. 326, p. 354.
51. [1971] S.C.R. 689, p. 717.
52. *Supra*, n. 22, p. 278.
53. [1881] 7 App. Cas. 96.
54. Gilbert L'Écuyer, *La cour suprême du Canada et le partage des compétences 1949-1978* (Québec: Gouvernement du Québec, ministère des Affaires intergouvernementales, 1978).
55. *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, p. 256, by Justices Taschereau, Fauteux and Abbott, and p. 214 by Justice Rand (Justice Cartwright was in agreement); *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, pp. 1296-97 by Justice Pigeon.
56. *Liquidators of Maritime Bank v. Receiver General of New Brunswick*, [1892] A.C. 437, p. 443. See also *Bonanza Creek Gold Mining Co. v. R.*, [1916] 1 A.C. 566.
57. See, *supra*, nn. 25, 27 and 29.
58. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), p. 71.
59. (1900) 27 O.A.R. 172.
60. See Ivan Bernier, "Le concept d'union économique dans la Constitution canadienne : de l'intégration commerciale à l'intégration des facteurs de production" (1979), 20 *Cahiers de droit* 177, pp. 203-205.
61. Such is the case for setting minimum wages (see *Construction Montcalm Inc. v. Minimum Wage Commission*, [1979] 1 S.C.R. 754). If we rely on suggestions advocating that government contracts be used to foster the achievement of wage parity between men and women, this trend is apparently not about to be reversed.
62. Wiltshire, *supra*, n. 10.
63. *Ibid.*, p. 355.
64. On section 94 of the *Constitution Act, 1867*, see Jacob S. Ziegel, "Harmonization of Provincial Laws, with Particular Reference to Commercial, Consumer and Corporate Law," in *Harmonization of Business Law in Canada*, volume 56 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
65. It should be noted that the federal government has participated in the work of the Uniform Law Conference of Canada since 1935 and that it has become a full member of the organization. The main achievements in harmonizing legislation or administrative practices involving the federal government concern the work of the Conference's Criminal Law Section (Ziegel, *supra*, n. 64).
66. Ziegel, *supra*, n. 64.
67. *Ibid.*, pp. 55-61.
68. Philip Anisman, "The Regulation of the Securities Market and the Harmonization of Provincial Laws," in *Harmonization of Business Law in Canada*, volume 56 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
69. Marvin G. Baer, "Harmonization of Canadian Insurance Law," in *Harmonization of Business Law in Canada*, volume 56 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
70. *Ibid.*
71. A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworth, 1963).
72. *Procureur du Roi v. Benoit et Gustave Dassonville*, case 8/74 *Recueil*, 1974, p. 837; for

- a general overview, see A.W.H. Meij and J.A. Winter, "Measures Having an Effect Equivalent to Quantitative Restrictions" (1976), *Common Market Law Review* 79; A.C. Page, "The Concept of Measures Having an Effect Equivalent to Quantitative Restrictions" (1977), 2 *European Law Review* 105.
73. With respect to the second branch of the commerce class, see Justice Dickson's comments in *A.-G. Canada v. Canadian National Transportation, Ltd.*, *supra*, n. 22, pp. 256–79.
  74. Christopher D. Gilbert, "Judicial Interpretation of the Australian and Canadian Constitutions," Ph.D. thesis, Toronto, Osgoode Hall Law School, 1983, pp. 2–16.
  75. See *State of Victoria v. Commonwealth (Petroleum & Minerals Authority)* (1975), 134 C.L.R. 81, p. 121 by Justice Barwick and p. 185 by Justice Mason. However, it is to be noted that the Senate does not actually enjoy complete equality with the House of Representatives, especially with regard to budget allocation measures.
  76. See Réjean Pelletier, "La réforme du Sénat canadien à la lumière d'expériences étrangères" (1984), 25 *Cahiers de droit* 209, p. 217 et seq.
  77. Gilbert, *supra*, n. 74, pp. 17–22.
  78. *Ibid.*, pp. 35–73.
  79. See Jacob Isaac Fajgenbaum and Peter Hanks, *Australian Constitutional Law*, 2nd ed. (Sydney: Butterworth, 1980), pp. 557–59; P.H. Lane, *The Australian Federal System*, 2nd ed. (Sydney: The Law Book Company, 1979), p. 114; *State of Victoria v. Commonwealth* (1926), 38 C.L.R. 399; *Grasstree Poultry Enterprises Pty. Ltd. v. Bycroft* (1969), 38 C.L.R. 399.
  80. J.M. Hayes, *Economic Mobility in Canada* (Ottawa: Minister of Supply and Services Canada, 1982), p. 192; Lane, *supra*, n. 79, p. 112; Gilbert, *supra*, n. 74, pp. 393–413.
  81. Hayes, *supra*; n. 80, p. 193; Lane, *supra*, n. 79, p. 111; *James v. Commonwealth* (1928), 41 C.L.R. 442.
  82. Lane, *supra*, n. 79, p. 109. Similarly, tax discrimination established through administrative discretion delegated by legislation is liable to be quashed under subsection (ii) of section 51.
  83. *Ibid.*, pp. 113–15.
  84. See section 91 of the Australian Constitution.
  85. Michael Coper, *Freedom of Interstate Trade Under the Australian Constitution* (Melbourne: Butterworth, 1983), p. 16 et seq. Our analysis of section 92 is drawn largely from Professor Coper's remarkable monograph. See also Michael Coper, "Section 92 and the Impressionistic Approach" (1984), *Australian Law Journal* 92; Ian Timby, "In This Labyrinth There Is No Golden Thread" (1984), 58 *Australian Law Journal* 86; Lane, *supra*, n. 79, pp. 755–847; Leslie Zines, *The High Court and the Constitution* (Sydney: Butterworth, 1981), pp. 79, 80, 124 et seq.
  86. (1920), 28 C.L.R. 530.
  87. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 18–20; Zines *supra*, n. 85, pp. 80 and 81.
  88. The High Court of Australia justified the nonapplicability of section 92 to the commonwealth by the incompatibility that would have resulted, according to the court, with its power to legislate with regard to commerce and interstate trade under section 51(i) of the Australian Constitution (Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 20 and 37). It should be noted that Mr. Justice Isaacs favoured a pragmatic interpretation of the notion of commerce (see Patrick Kenniff and Peter W. Hutchins, "The Concept of Interstate Commerce: A Case Study of Judicial Review in Canada, the United States and Australia" (1969), 10 *Cahiers de droit* 705, p. 717).
  89. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 21–60; Zines, *supra*, n. 85, p. 81 et seq.
  90. *R. v. Vizzard; ex parte Hill* (1933), 50 C.L.R. 30; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 44–47 and Zines, *supra*, n. 85, pp. 82 and 83.
  91. (1935), 55 C.L.R. 1 (C.P.). However, it is to be noted that the commonwealth is limited by section 92 with respect to interstate commerce, but not with regard to international commerce (Lane, *supra*, n. 79, p. 64).



92. *Australian National Airlines Pty. Ltd. v. Commonwealth* (1945), 71 C.L.R. 29; see M. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 90–92. In this case, an act of the commonwealth aimed at establishing an agency responsible for the interstate transportation by air of goods and persons and entrusting it with a monopoly over these activities. The creation of the national corporation was deemed valid under the commonwealth's power to legislate with regard to interstate commerce (section 51(i) of the Constitution), but the granting of a monopoly was deemed contrary to section 92.
93. *Commonwealth v. Bank of New South Wales* (1949), 79 C.L.R. 497 (C.P.) and Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 60–62.
94. Zines, *supra*, n. 85, p. 84.
95. *Ibid.*, pp. 85 and 86.
96. *Supra*, n. 93; Lane, *supra*, n. 79, pp. 89–93. The Privy Council outlined its individual right theory despite strong indications that the authors of section 92 probably did not dwell upon it (Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 103 and 112; Zines, *supra*, n. 85, p. 85).
97. *Supra*, n. 93, p. 639.
98. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 105–106. Generally, the prohibition of an activity is not considered as a “regulatory” process of the activity, although the Privy Council noted:  

Every case must be judged on its own facts and its own setting of time and circumstances, and it may be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to state monopoly was the only practical and reasonable manner of regulation and that interstate trade commerce and intercourse thus prohibited and thus monopolised remained absolutely free. (*Bank of New South Wales v. Commonwealth* (1949), 79 C.L.R. 497, pp. 640 and 641).
- In *Clark King and Co. Pty. Ltd. v. Australian Wheat Board* ((1978), 140 C.L.R. 120), a public monopoly responsible for marketing wheat was declared valid (Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 264–67).
99. See the section on the United States.
100. (1954), 93 C.L.R. 1, p. 22; see Coper *Freedom of Interstate Trade*, *supra*, n. 85, pp. 111–15; Zines, *supra*, n. 85, pp. 91 and 92. The High Court of Australia nonetheless declared such a system valid 20 years earlier in the *Vizzard* (*R. v. Vizzard; ex parte Hill* decision ((1933), 50 C.L.R. 30) at a time when the principle of interpretation established by the *McArthur* decision held sway (Coper, *Freedom of Interstate Trade*, *supra*, n. 85 p. 44–49).
101. *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (New South Wales)* (1935), 52 C.L.R. 189; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 52–54; with respect to Chief Justice Dixon's doctrine see Zines, *supra*, n. 85, pp. 94–106.
102. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 5, 101, 176 et seq.
103. *Ibid.*, p. 178.
104. *Ibid.*, p. 180.
105. *Hospital Provident Fund Ltd. v. Victoria* (1953), 87 C.L.R. 1; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 124–27.
106. *Wragg v. New South Wales* (1953), 88 C.L.R. 353; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 127–30.
107. *Grannall v. Marrickville Margarine Pty. Ltd.* (1955), 93 C.L.R. 55; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 135–41.
108. *Wilcox Mofflin Ltd. v. New South Wales* (1952), 85 C.L.R. 488; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 120–22.
109. *Williams v. Metropolitan and Export Abattoirs Board* (1953), 89 C.L.R. 66; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 130–32.
110. *Grannall v. C. Geo Kellaway & Sons Pty. Ltd.* (1955), 93, C.L.R. 36.
111. (1955), 93 C.L.R. 127; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 147–50.

112. Kenniff and Hutchins, *supra*, n. 88, pp. 725 and 726; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 148–50, 177.
113. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 129, 134 and 169–72.
114. *Ibid.*, p. 182.
115. See Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 157–62.
116. *R. v. Vizzard; Ex parte Hill* (1933), 50 C.L.R. 30; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 44 and 45.
117. *Hughes and Vale Pty. Ltd. v. New South Wales (No. 1)* (1954), 93 C.L.R. 1 (C.P.); Coper, *Freedom of Interstate Trade*, *supra*, n. 85, p. 115.
118. *Hughes and Vale Pty. v. New South Wales (No. 2)* (1955), 93 C.L.R. 127.
119. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 157 and 158; Zines, *supra*, n. 85, p. 92.
120. *Collier Garlano Ltd. v. Hotchkiss* (1957), 97 C.L.R. 475; *Chapman v. Suttie* (1963), 110 C.L.R. 321; *Nominal Defendant v. Dunstan* (1963), 109 C.L.R. 143; *Kerr v. Pelly* (1957), 97 C.L.R. 310; *Perre v. Pollitt*, (1976), 135 C.L.R. 139; *Sleigh (HC) Ltd. v. South Australia* (1977), 136 C.L.R. 475; *Smith v. Capewell* (1979), 26 A.L.R. 507; *Buck v. Barony* (1976), 135 C.L.R. 100; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 158 and 159, 256–58.
121. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, p. 191 et seq.
122. *Samuels v. Reader's Digest Association Pty. Ltd.* (1969), 120 C.L.R. 1; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 206–11.
123. *Associated Steamships Pty. v. Western Australia* (1969), C.L.R. 92; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 206 and 211–16; with respect to Chief Justice Barwick's thinking on the matter, see Zines, *supra*, n. 85, pp. 107–30.
124. *SOS (Mawbray) Pty. Ltd. v. Mead* (1972), 124 C.L.R. 529; *Cantarella v. Egg Marketing Board (New South Wales)* (1972), 124 C.L.R. 605; see Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 224–34.
125. (1975), 134 C.L.R. 559; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 236–40.
126. *Permewan Wright Consolidated Pty. Ltd. v. Trehwitt* (1979), 27 A.L.R. 182; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 240 and 241.
127. *R. v. Anderson; Ex parte Ipec-Air Pty. Ltd.* (1965), 113 C.L.R. 177; *Beal v. Marrickville Margarine Pty. Ltd.* (1966), 114 C.L.R. 283; *Damjanovic and Sons Pty. v. Commonwealth* (1968), 117 C.L.R. 390; *Barterrs Enterprises v. Todd* (1978), 139 C.L.R. 499. See also Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 194–200, 247 and 248. *Amett Transport Industries (Operations) Ltd. v. Commonwealth* (1977), 139 C.L.R. 54.
128. *Pene v. Polhitt* (1976), 135 C.L.R. 139; *Ansett Transport Industries (Operations) Pty. Ltd. v. Commonwealth* (1977), 139 C.L.R. 54; *Finemores Transport Pty. Ltd. v. New South Wales* (1978), 139 C.L.R. 338; *McGraw-Hinds (Australia) Pty. Ltd. v. Festival Stores* (1979), 24 A.L.R. 175; *Sleigh (HC) Ltd. v. South Australia* (1977), 136 C.L.R. 475; *Ex parte H. Brazil & Co. Pty. Ltd.* (1978), 138 C.L.R. 194; *Clark King & Co. Pty. Ltd. v. Australian Wheat Board* (1978), 140 C.L.R. 120; *Smith v. Capewell* (1979), 26 A.L.R. 507; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 243–54.
129. Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 217 and 218.
130. *North Eastern Dairy Co. Ltd. v. Dairy Industry Authority (New South Wales)* (1975), 134 C.L.R. 559; *Permewan Wright Consolidated Pty. v. Trehwitt* (1979), 27 A.L.R. 182. See Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 258–62.
131. (1978), 140 C.L.R. 120; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 264–67.
132. (1980), 32 A.L.R. 57; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 277, 280 and 281.
133. See *Pilkington v. Frank Hammond Pty. Ltd.* (1974), 131 C.L.R. 497; *J. Bernard and Co. Pty. v. Langley* (1980), 54 A.L.J.R. 568; Coper, *Freedom of Interstate Trade*, *supra*, n. 85, pp. 278–81.
134. *Commonwealth v. Bank of New South Wales* (1949), 79 C.L.R. 497, p. 637.
135. Hayes, *supra*, n. 80, p. 216 et seq.; Lane, *supra*, n. 79, pp. 899–908.



136. On section 109 of the Australian Constitution see Fajgenbaum and Hanks, *supra*, n. 79, p. 651; Lane, *supra*, n. 79, pp. 863–98; Gilbert, *supra*, n. 74, pp. 479–526; Allan Murray-Jones, “The Tests for Inconsistency Under Section 109 of the Constitution” (1979), 10 *Federal Law Review* 25; Gary A. Rumble, “The Nature of Inconsistency Under Section 109 of the Constitution” (1980), 11 *Federal Law Review* 40.  
On subsection (xxxix) of section 59, see Lane, *supra*, n. 79, p. 343 et seq.; Gary A. Rumble, “Comments — Section 51 (xxxix) of the Constitution and the Federal Distribution of Power” (1982–83), 13 *Federal Law Review* 182; Hayes, *supra*, n. 80, p. 191; Fajgenbaum and Hanks, *supra*, n. 79, pp. 653–56.
137. Section 107 simply states: “Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.”  
The extent of each State’s powers is to be found elsewhere, principally in their respective constitutions. The States are generally empowered to legislate for peace, well-being and good government (Lane, *supra*, n. 79, p. 2).
138. *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (1920), 28 C.L.R. 129. See also the High Court of Australia’s recent decision in *Commonwealth v. State of Tasmania* (1983), 57 A.L.J.R. 450, pp. 487, 528 and 549. The engineers’ case must, however, be tempered by the High Court of Australia’s insistence on preserving the integrity of the federative structure of the Australian State (see *Melbourne Corporation v. Commonwealth* (1947), 74 C.L.R. 31; Lane, *supra*, n. 79, p. 966 et seq.; Gilbert, *supra*, n. 74, pp. 43–74).
139. *Hematie Petroleum P/L v. State of Victoria* (1983), 57 A.L.J.R. 591, p. 604.
140. *W.A. McArthur Ltd. v. Queensland* (1920), 28 C.L.R. 530, pp. 546 and 547. See Lane, *supra*, n. 79, pp. 57–60. It should be noted that the words “trade and commerce” employed in section 51 (ii) have the same meaning as they do in section 92 (see Lane, *supra*, n. 79, p. 827).
141. See Lane, *supra*, n. 79, pp. 57–92 and section 98 of the Australian Constitution.
142. *Strickland v. Rockla Concrete Pipes Ltd.* (1971), C.L.R. 468. Section 51 (xx) of the Australian Constitution confers on the federal Parliament legislative responsibility for “foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth.” See Lane, *supra*, n. 79, pp. 153–90; Gilbert, *supra*, n. 74, pp. 61–65 and 90–95; Fajgenbaum and Hanks, *supra*, n. 79, p. 618; Colin Hoard and Cheryl Saunders, *Cases and Materials on Constitutional Law* (Sydney: The Law Book Company, 1979), pp. 332–40; and Zines, *supra*, n. 85, pp. 62–72.
143. (1982), 56 A.L.J.R. 366; see P.H. Lane, “The Federal Parliament’s External Affairs Power: The Tasmanian Dam Case” (1983), 57 A.L.J. 554, p. 558. *Commonwealth v. State of Tasmania* (1983), 46 A.L.R. 625, pp. 813–16 by Justice Deane.
144. Zines, *supra*, n. 85, pp. 72–78. However, it should be noted that it is recognized that the Commonwealth may establish companies operating in fields of activity otherwise under its jurisdiction, such as insurance companies (section 51 (xiv)). Moreover, the Constitution formally confers on the Commonwealth the power to create banks (section 51 (xiii)), Zines, *supra*, n. 85, pp. 19 and 20).
145. *Australian Constitution*, section 51 (ii), 90, 88, and 114. See also sections 52 (ii), 69 and 91. See Lane, *supra*, n. 79, pp. 983 and 984; Gilbert, *supra*, n. 74, p. 199 et seq.
146. Gilbert, *supra*, n. 74, p. 216.
147. *Victoria and New South Wales v. Commonwealth* (Second Uniform Tax Case) (1957), 99 C.L.R. 575 (H.C.A.); Gilbert, *supra*, n. 74, pp. 237–54.
148. For a review of tax arrangements between the Commonwealth and the States, see the Honourable P.J. Keating, *Payments to or for the States, the Northern Territory and Local Government Authorities 1983–84*, Budget paper no. 7 (Canberra: Australian Government Publishing Service, 1983), p. 13 et seq. For comments on these agreements, see Lane, *supra*, n. 79, pp. 93–119; Wayne R. Thirsk, “Fiscal Harmonization in the United States, Australia, West Germany, Switzerland and the EEC,” in M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene and J. Whalley (eds.), *Federalism and the*

- Canadian Economic Union* (Toronto: University of Toronto Press for the Ontario Economic Council, 1983), pp. 431–35; Hayes, *supra*, n. 80, p. 224; Ross Cranston, “From Co-Operative to Coercitive Federalism and Back?” (1979), 10 *Federal Law Review* 121, p. 128 et seq.; M.D. Strokes, “How to Reform Australian Federalism” (1978–80), 6 *Tasmania Law Journal* 227, p. 281; Fajgenbaum and Hanks, *supra*, n. 79, p. 229 et seq.; Howard and Saunders, *supra*, n. 142, p. 359 et seq.; Christopher Enright, *Constitutional Law* (Sydney: The Law Book Company, 1977), p. 150; Geoffrey Sawer, *Seventy-Five Years of Australian Federalism*, Document no. 21 (Canberra: Australian National University, Centre for Research on Federal Financial Relations, 1977), pp. 6 and 7; Russell Matthews, *Federalism in Retreat: The Abandonment of Tax Sharing and Fiscal Equalization*, Document no. 50 (Canberra: University of Australia, Centre for Research on Federal Financial Relations, 1982); Russell Matthews, “The Development of Australian Fiscal Federalism,” in Advisory Commission on Intergovernmental Relations, *Studies in Comparative Federalism: Australia* (Washington, D.C.: ACIR, 1981), p. 5; Richard M. Bird, *Federal Finance in Comparative Perspective* (Toronto: University of Toronto, Institute for Policy Analysis, April 1984), pp. 23 and 24; for a detailed discussion of the constitutional division of taxation powers, see Gilbert, *supra*, n. 74, pp. 199–267. It should be noted that Parliament may not benefit from the support of section 109 (confirming the predominance of the Commonwealth’s laws over those of the States) as the incompatibility required (between federal and State laws, both of which are valid) to bring about its application is theoretically impossible, given that federal tax measures are limited to federal purposes, while the States’ measures are limited to their own ends (Lane, *supra*, n. 79, p. 878).
149. *Hematie Petroleum Pty. Ltd. v. State of Victoria* (1983), 57 A.L.J.R. 591, p. 602 by Justice Mason. See also *H. C. Sleigh Ltd. v. South Australia* (1977), 136 C.L.R. 475; *Logan Downs Pty. Ltd. v. Queensland* (1977), 37 C.L.R. 59; Michael Coper, “The High Court and Section 90 of the Constitution” (1976), 7 *Federal Law Review* 1; Hayes, *supra*, n. 80, p. 224; Howard and Saunders, *supra*, n. 142, pp. 341–57; W. Thirsk, *supra*, n. 148, p. 432; Lane, *supra*, n. 79, pp. 719 and 720 and, for a general overview, pp. 717–54. Section 90 is not a source of the Commonwealth’s legislative powers as it only prohibits the States from levying excise or customs duties. It is under the Commonwealth’s taxation power (section 51 (ii)) that it is empowered to levy and collect such duties (see Lane, *supra*, n. 79, pp. 718 and 719).
  150. *Dickenson’s Arcade Pty. Ltd. v. The State of Tasmania* (1974), 130 C.L.R. 177 (H.C.) commented in Howard and Saunders, *supra*, n. 142, pp. 341–57.
  151. Fajgenbaum and Hanks, *supra*, n. 79, p. 206 et seq., and Howard and Saunders, *supra*, n. 142, p. 389 et seq. See the exception indicated in section 91 of the Australian Constitution. R.S. Gilbert, *The Future of the Australian Loan Council* (Canberra: Australian National University, Centre for Research on Federal Financial Relations, 1974); W.R.C. Jay, “The Australian Loan Council,” in Advisory Commission on Intergovernmental Relations, *Studies in Comparative Federalism: Australia* (Washington, D.C.: ACIR, 1981), p. 51. See also section 105 of the Australian Constitution.
  152. See Fajgenbaum and Hanks, *supra*, n. 79, p. 206 et seq.; and Howard and Saunders, *supra*, n. 142, p. 389 et seq.
  153. Cranston, *supra*, n. 148, p. 129 et seq.; Howard and Saunders, *supra*, n. 142, pp. 373–89; Dupont, *supra*, n. 25, pp. 73 and 74. See *South Australia v. Commonwealth* (1942), 64 C.L.R. 373 (commonly called First Uniform Tax Case) and *Victoria v. Commonwealth (Second Uniform Tax Case)* (1957), 99 C.L.R. 575; Russell Matthews, “Fiscal Equalization in Australia,” in Advisory Commission on Intergovernmental Relations, *Studies in Comparative Federalism: Australia* (Washington, D.C.: ACIR, 1981), p. 17; Justice Else-Mitchell, “The Australian Federal Grants System and Its Impact on Fiscal Relations of the Federal Government with State and Local Governments,” in Advisory Commission on Intergovernmental Relations, *Studies in Comparative Federalism: Australia* (Washington, D.C.: ACIR, 1981), p. 27.
  154. Fajgenbaum and Hanks, *supra*, n. 79, p. 597; Howard and Saunders, *supra*, n. 142, pp. 354 and 355.
  155. Cranston, *supra*, n. 148, p. 129 et seq.; Lane, *supra*, n. 79, pp. 849–61; *Deputy Federal*



- Commissioner of Taxation (N.S.W.) v. W.R. Moran Pty. Ltd.* (1939), 61 C.L.R. 735 (H.C.), conf. (1940), 63 C.L.R. 338 (C.P.); see the recent *A.-G. Victoria; ex. rel. Black v. Commonwealth* decision (1981), 33 A.L.R. 321; David C. Bennett, "Case Note — *Attorney General for Victoria; ex. rel. Black v. The Commonwealth*" (1982), 12 *Federal Law Review* 271.
156. Cranston, *supra*, n. 148, pp. 133, 136 et seq.
  157. See *Victoria v. Commonwealth & Hayden* (1975), 134 C.L.R. 338, commented by Fajgenbaum and Hanks, *supra*, n. 79, p. 629 et seq., and Zines, *supra*, n. 85, pp. 127–30. See also *A.-G. Victoria v. Commonwealth* (1946), 71 C.L.R. 237 (commonly called *Pharmaceutical Benefits Case*); Dupont, *supra*, n. 25, pp. 73 and 74.
  158. H. Burmester, "The Australian States and Participation in the Foreign Policy Process" (1978), 9 *Federal Law Review* 257, pp. 259–67; Lane, *supra*, n. 79, pp. 238 and 239.
  159. *R. v. Burgess* (1936), 55 C.L.R. 608; Lane, *supra*, n. 79, p. 243 et seq.
  160. *Koowarta v. Bjelke – Persen* (1982), 56 A.L.J.R. 625; P.H. Lane, "The Federal Parliament's External Affairs Power: Koowarta's Case" (1982), 56 A.L.J.R. 519; P.H. Lane, "The Plenitude of the External Affairs Power" (1982), 56 A.L.J.R. 381; *Commonwealth v. State of Tasmania* (1983), 46 A.L.R. 625; P.H. Lane, "The Federal Parliament's External Affairs Power: The Tasmanian Dam Case" (1983), 57 A.L.J. 554; M. Crock, "Federalism and the External Affairs Power" (1983), 14 *Melbourne University Law Review* 238. With respect to the situation which prevailed prior to that time, see Paul B. Van Son, "The Australian Constitution: The External Affairs Power and Federalism" (1981–82) 12 *California Western International Law Journal* 46; Burmester, *supra*, n. 158, p. 275 et seq.; Lane, *supra*, n. 79, pp. 249–57.
  161. *The Commonwealth v. State of Tasmania* (1983), 57 A.L.J.R. 450, p. 486 by Justice Mason.
  162. Burmester, *supra*, n. 158, pp. 281 and 282.
  163. Cranston, *supra*, n. 148, p. 123.
  164. Wiltshire, *supra*, n. 10, pp. 355 and 359–62; Cranston, *supra*, n. 148, p. 123.
  165. See *South Australia v. Commonwealth* (1962), 109 C.L.R. 130; Cranston, *supra*, n. 148, pp. 126 and 127, n. 19.
  166. Cranston, *supra*, n. 148, pp. 136–38, 141.
  167. Gilbert, *supra*, n. 74, pp. 293–413.
  168. See *Re Duncan the Coal Industry Tribunal; Ex parte Australian Iron and Steel Pty. Ltd.* (1983), 57 A.L.J.R. 649; see also "Marble Cake Federalism Under the Australian Constitution" (1984), 58 A.L.J. 1.
  169. *Re Duncan the Coal Industry Tribunal*, *supra*, n. 168, pp. 654 and 655 (Chief Justice Gibbs) and pp. 658 and 659 (Justice Mason).
  170. *Commonwealth of Australia Constitution Act, 1900* (U.K.) 63 and 64 Victoria, c. 12, art. 51 (xxxvii); see Lane, *supra*, n. 79, pp. 961–64.
  171. See John Moldring, "Unification and Harmonization of the Rules of Law" (1978), 9 *Federal Law Review* 284, p. 309 et seq.; Ziegel, *supra*, n. 64; W.A.W. Neilson, "Interjurisdictional Harmonization of Consumer Protection Laws and Administration in Canada," in *Perspectives on the Harmonization of Law in Canada*, volume 55 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), appendix.
  172. "The Congress shall have Power [ . . . ] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."
  173. Craig R. Ducat and Harold W. Chase, *Constitutional Interpretation*, 3rd ed. (St. Paul: West Publishing, 1983), pp. 357 and 358. On the history of the Tenth Amendment, see Justice Powell's remarks in *Garcia v. San Antonio Metropolitan Transit Authority*, United States Supreme Court, February 19, 1985, pp. 13 and 14. Moreover, it should be noted that, from the outset, the courts, basing themselves on the precepts

of natural law as the ideological foundation for elaborating and formulating the U.S. Constitution ("social compact theory"), were highly reticent about any infringement by Congress or the states on certain inalienable personal rights, such as freedom of property. Such rights were even recognized prior to the adoption of the Fifth (1791) and Fourteenth (1868) Amendments (see Luc Tremblay, "Section 7 of the Charter: Substantive Due Process?" (1984), 2 *University of British Columbia Law Review* 201, pp. 214–18.

174. *Ibid.*, pp. 359 and 360.
175. *Ibid.*, pp. 361–64; see the recent *Federal Energy Regulatory Commission v. Mississippi* decision, 456 U.S. 742, pp. 767–69, 72 L. Ed. 2d 532, pp. 552 and 553 (1982) by Justice Blackmun.
176. Edward S. Corwin, *The Constitution and What It Means Today*, 14th ed. (Princeton: Princeton University Press, 1978), p. 41.
177. *Constitution of the United States*, art. I (8) 1st paragraph *in fine*.
178. *Woodruff v. Parkam*, 8 Wall. 133 (1868).
179. *Spalding v. Edwards*, 262 U.S. 66 (1923). Also note the sixth paragraph of section 9 of article I which stipulates that "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay Duties in another."
180. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1871).
181. *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 70–71, 94 S. Ct. 2108, 2113, 40 L. Ed. 2d 660 (1974); *Empresa Siderurgica v. County of Merced*, 337 U.S. 154, 157, 69 S. Ct. 995, 997, 93 L. Ed. 1276 (1949); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69, 43 S. Ct. 485, 486, 67 L. Ed. 865 (1923); *Coe v. Errol*, 116 U.S. 517, 526, 527, 6 S. Ct. 475, 477, 478, 29 L. Ed. 715 (1886). For a general overview, see Corwin, *supra*, n. 176, pp. 142–44.
182. 423 U.S. 276, pp. 285 and 286 (1976).
183. *Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 758 (1978).
184. See the section devoted to the free movement of persons. The clause respecting privileges and immunities was strengthened by the Fourteenth Amendment, which stipulates that "[. . .] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States (. . .)."
185. Corwin, *supra*, n. 176, pp. 255–59. See *Austin v. State of New Hampshire*, 420 U.S. 656 (1975); *Travis v. Yale and Town Manufacturing Co.* 252 U.S. 60 (1920). See Jerome R. Hellerstein, "State Tax Discrimination Against Out-of-States" (1977), 30 *National Tax Journal* 113, pp. 113–15.
186. *Paul v. Va.*, 8 Wall 168 (1898); *Western Turf Association v. Greenberg* 204 U.S. 359 (1907); Hellerstein, *supra*, n. 185, p. 114, n. 15.
187. See *Shafter v. Carter*, 252 U.S. 37 (1920).
188. See Hellerstein, *supra*, n. 185, p. 115; Corwin, *supra*, n. 176, pp. 256 and 257.
189. 25 U.S. (12 Wheat.) 212 (1827). For a general overview, see Joel B. Grossman and Richard G. Wells (eds.), *Constitutional Law and Judicial Policy Making*, 2nd ed. (New York: John Wiley, 1980), pp. 342–44; Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980), pp. 60–82; Alfred H. Kelly, Winfred A. Harbinson and Herman Belz, *The American Constitution, Its Origin and Development*, 6th ed. (New York: Norton, 1983), pp. 193–201 and pp. 235 and 236.
190. *Stone v. Mississippi*, 101 U.S. 814 (1879). See also *Charles River Bridge Co. v. Warren Bridge Co.*, 11 Pet. 420 and *Atlantic Coast Line Railroad Co. v. City of Goldsboro*, 232 U.S. 548 (1914); *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934); *City of El Paso v. Simmons*, 379 U.S. 497 (1965).
191. See *United Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977) Siegan, *supra*, n. 189, pp. 237 and 238; *Allied Structural Co. v. Spannaus*, 438 U.S. 234 (1978); Ducat



- and Chase, *supra*, n. 173, pp. 600–603; Frank D. Wagner, “State’s Exercise of Police Power as Constituting Impairment of Obligation of Private Contract in Violation of Contract Clause of Federal Constitution—Supreme Court Cases,” 57 L. Ed. 2d 1229; *Energy Reserves v. Kansas Power and Light*, 459 U.S. 400 (1983).
192. 3 U.S. (3 Dall.) 386 (1978); see Siegan, *supra*, n. 189, pp. 67–81.
  193. *Constitution of the United States*, art. 1(9) (paragraph); Corwin, *supra*, n. 176, pp. 129–31.
  194. “Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (*Constitution of the United States*, Fourteenth Amendment, subsection 1).  
Unlike the clause respecting the privileges and immunities of citizens, the Fourteenth Amendment (except with regard to the guarantee covering privileges and immunities) may be invoked by companies: see *Santa Clara County v. Southern Pacific R.R. Co.*, 118 U.S. 394 (1886); Hellerstein, *supra*, n. 185, p. 124.  
In many respects, the Fifth and Fourteenth Amendments have only formally expressed the principles of interpretation applied previously by the Supreme Court, i.e., respect for the precepts of natural law (see Tremblay, *supra*, n. 173, pp. 217, 218, 223).
  195. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); see Siegan, *supra*, n. 189, pp. 110–26; Kelly, et al., *supra*, n. 189, p. 414–17 and 457–59; Ducat and Chase, *supra*, n. 173, pp. 603–10.
  196. Siegan, *supra*, n. 189, pp. 190 and 191 and, for a general overview, see pp. 109–246; Corwin, *supra*, n. 176, pp. 385–90, 460 and 461.
  197. Grossman and Wells (eds.), *supra*, n. 189, p. 323; Kelly, et al., *supra*, n. 189, p. 458.
  198. Siegan, *supra*, n. 189, pp. 184–203; Kelly, et al., *supra*, n. 189, pp. 480–500, 509 and 510.
  199. See Siegan, *supra*, n. 189, pp. 204–37; Ducat and Chase, *supra*, n. 176, pp. 1248 and 1249. The fundamental rights to which the courts pay special attention are the freedoms of expression, assembly, association and religion, the rights to vote, to mobility, to private life, and to impartiality with regard to criminal law. Generally, in the field of economic regulation, the Supreme Court presumes the validity of legislation adopted by governments and limits itself to verifying whether or not a given law is reasonably linked to the ends pursued by legislators (the “rational relationship” criterion) (Tremblay, *supra*, n. 173, pp. 224 and 225).
  200. Hellerstein, *supra*, n. 185, pp. 124–127; Corwin, *supra*, n. 176, pp. 517 and 518.
  201. The Supreme Court has also treated severely measures respecting searches of individuals or for documents: *General Motors Leasing Corporation v. United States* 429 U.S. 338 (1977). See jurisprudence quoted by Howard Hunter in “Federalism and State Taxation of Multistate Enterprises” (1982), 32 *Emory Law Journal* 89, 122–29; *ASARCO Inc. v. Idaho Tax Commission*, 102 S. Ct. 3103 (1982); *F.W. Woolworth Co. v. Taxation & Revenue Department*, 102 S. Ct. 3128 (1982). See also Paul J. Hartman, “Constitutional Limitations on State Taxation of Corporate Income from Multinational Corporations” (1984), 37 *Vanderbilt Law Review* 217 and Justice Steven’s remarks with regard to the impact of the obligation for “due process” on the States’ taxation powers (*Moorman Manufacturing Co. v. Blair*, 437 U.S. 267 (1978)).
  202. Corwin, *supra*, n. 176, pp. 390, 492 et seq. See also pp. 492 et seq. and 517 et seq. on the impact on the States’ taxation powers of the clause respecting equality before the law.
  203. This paragraph reads as follows: “No [. . .] direct [. . .] tax shall be paid unless in proportion to the census on enumeration herein before directed to be taken”; *Pollock v. Farmer’s Loan & Trust Co.*, 158 U.S. 601 (1985).
  204. The Sixteenth Amendment reads as follows: “The Congress shall have power to lay

and collect taxes on incomes, from whatever source devised, without apportionment among the several States and without regard to any census or enumeration” see Corwin, *supra*, n. 176, p. 539 et seq.

205. See Ducat and Chase, *supra*, n. 173, pp. 417–20.
206. Corwin, *supra*, n. 176, pp. 39 and 40. See Justice Blackmun’s comments in *Garcia v. San Antonio Metropolitan Transit Authority*, Supreme Court of the United States, February 19, 1985, pp. 11–18.
207. See, for example, *Marchetti v. United States*, 390 U.S. 39 (1968); *General Motors Leasing Corporation v. United States*, 429 U.S. 338 (1977).
208. Thirsk, *supra*, n. 148, pp. 438–42.
209. *Ibid.*, pp. 443 and 444; Office of the Secretary, Department of the Treasury, *Final Report of the Worldwide Unitary Taxation Group — Chairman’s Report and supplemental Views* (Washington, D.C., August 1984); see also Justice Stevens’ remarks respecting Congress’s power to imperatively harmonize tax rules decreed by the States (*Moorman Manufacturing co. v. Blair*, 437 U.S. 267 [1978]).
210. Thirsk, *supra*, n. 148, p. 444.
211. This provision reads as follows: “The Congress shall have power (. . .) to regulate Commerce with Foreign Nations and among the Several States, and with the Indian Tribes.” See James Leavy, *La clause de commerce et l’intégration économique* (Montreal: Les Éditions Thémis, 1982), p. 162.
212. *Lewis v. BT Investment Managers Inc.*, 447 U.S. 27, 35, 100 S. Ct. 2009, 2015, 64 L. Ed. 2d 702 (1980); *Hughes v. Oklahoma*, 441 U.S. 322, 326, 99 S. Ct. 1727, 1731, 60 L. Ed. 2d 250 (1979); *H.P. Hood & Sons Inc. v. Da Mond*, 336 U.S. 525, 534–538, 69 S. Ct. 657, 663–665, 934 L. Ed., 865 (1949).
213. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). For a general overview, see Bernard Schwartz, “Commerce, the States and the Burger Court” (1979), 74 *Northwestern University Law Review* 409, 409–11.
214. *Hunt v. Washington State Apple Marketing Commission*, 432 U.S. 333, 350 (1977). For an historical overview, see Edmund W. Kitch, “Regulation and the American Common Market”, in A. Dan Tarlock (ed.), *Regulation, Federalism and Interstate Commerce* (Cambridge, Mass.: Oelgeschlager, Gunn and Hain, 1981), pp. 11–20. Kitch maintains that provisions in the U.S. Constitution, including the commerce clause, do not result from a considered political program aimed at the establishment of a customs union, free-trade zone or a common market, but from the need to establish a central government capable of negotiating efficaciously with the European powers (pp. 20 and 21).
215. Grossman and Wells, *supra*, n. 189, p. 321.
216. 9 Wheat 1 (1824); Kelly, et al., *supra*, n. 189, pp. 201–204 and 236–41; Paul R. Benson Jr., *The Supreme Court and the Commerce Clause, 1937–1970* (New York: Dunellen Publishing, 1970), pp. 9–24; Smith, *supra*, n. 71, pp. 193–202.
217. Leavy, *supra*, n. 211, p. 163; Smith, *supra*, n. 71, pp. 201–204.
218. Smith, *supra*, n. 71, pp. 204–207.
219. 12 How. 299 (1851).
220. Grossman and Wells, *supra*, n. 189, p. 338. With regard to the concepts of dualist and cooperative federalism, see Ducat and Chase, *supra*, n. 173, p. 335 et seq.
221. Benson, *supra*, n. 216, p. 35 et seq.; Smith, *supra*, n. 71, pp. 214–35.
222. *Houston E. & W Texas Ply Co. v. U.S.*, 234 U.S. 342 (1914); see Leavy, *supra*, n. 211, pp. 165–67; Smith, *supra*, n. 71, pp. 275–86 and 372–474.
223. See *U.S. v. E.C. Knight*, 156 U.S. 1, p. 16 (1895); *Hamer v. Dagenhart*, 247 U.S. 251, pp. 271 and 272 (1918); Kenniff and Hutchins, *supra*, n. 88, pp. 710, 711 and 714; Benson, *supra*, n. 216, pp. 35–72; Smith, *supra*, n. 71, p. 231; Ducat and Chase, *supra*, n. 173, pp. 411–14.
224. Grossman and Wells, *supra*, n. 189, p. 324; Leavy, *supra*, n. 211, pp. 167 and 168.
225. Grossman and Wells, *supra*, n. 189, p. 329; Leavy, *supra*, n. 211, p. 169; Kenniff and Hutchins, *supra*, n. 88, pp. 723 and 724; P.R. Benson, *supra*, n. 216, pp. 73–108.



226. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); Kelly, et al., *supra*, n. 189, p. 506.
227. Congress is empowered to regulate interstate activities which affect interstate commerce just as it may regulate interstate commerce itself: *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937); *U.S. v. Darby*, 312 U.S. 100 (1941); *American Power and Light Co. v. S.E.C.*, 329 U.S. 90 (1946); *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964); *Fry v. United States*, 421 U.S. 542 (1975); *Perez v. United States*, 402 U.S. 146 (1971).
228. Justice Blackmun of the Supreme Court recently emphasized that the commerce clause enables Congress to control the entire field of regulation of relations between private parties (see *Federal Energy Regulatory Commission v. Mississippi* 456 U.S. 752, 758, 764, 724 L. Ed. 2d 532, 546, 550 (1982)). The Tenth Amendment (conferring residual powers on the states) limited the scope of the commerce clause for more than a century until, in 1941, the Supreme Court, in the *United States v. Darby* case, restored the full weight of the commerce clause (see Corwin, *supra*, n. 176, pp. 366–74). However, the Supreme Court fell back once again (although in an obscure fashion) on the Tenth Amendment as a bulwark guaranteeing a minimum of protection to the states (see Chief Justice Burger's remarks in *Equal Employment Opportunity Commission*, 103 S. Ct. 1054, 1068 and 1069 (1983). The commerce clause does not dispense Congress from respecting fundamental freedoms such as the right to be judged by a jury (*United States v. Jackson*, 390 U.S. 570) [1968]) and "due process" in the Fifth Amendment (*Leary v. United States*, 395 U.S. 6 [1969]). See also "Taking Federalism Seriously: Limiting State Acceptance of National Grants" (1981), 90 *Yale Law Journal* 1694, p. 1701. It should be noted that Congress's full power to regulate commerce includes that of allowing — or prohibiting — its regulation by the States (Grossman and Wells, *supra*, n. 189, pp. 340 and 341).
229. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976); *Hodel v. Virginia Surface Mining Reclamation Association*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed. 2d 547 (1982); *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 752, 72 L.Ed. 2d 532 (1982); *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678 (1982); *Garcia v. San Antonio Metropolitan Transit Authority*, Supreme Court, February 15, 1985.

The debate surrounding the intrinsic limits of the commerce clause resurfaced in 1976, in the *National League of Cities v. Usery* decision, where the majority of Supreme Court justices opposed respect for the federative nature of the United States to the application to state employees of a federal act concerning employment standards. This revival of the theory of the inviolability of certain state rights has not really been expanded upon since then, although the Court remains deeply divided on the question, as indicated by its recent decision in *Equal Employment Opportunity Commission v. Wyoming* (103 S.Ct. 1054, 75 L.Ed. 2d 78 (1983)). In the latter decision, Mr. Justice Burger (dissenting) summarized the criteria which must be taken into account in analyzing the application of the commerce clause to the states as such:

"To decide whether a particular enactment has improperly intruded into Tenth Amendment rights, we have adopted a three-prong test:

First, there must be a showing that the challenged regulation regulates the 'States as States.' [*National League of Cities, supra*], at 854 [49 L.Ed. 2d 245, 96 S.Ct. 2465]. Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' *Ibid.*, at 845 [49 L.Ed. 2d 245, 96 S.Ct. 2465]. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' *Ibid.*, at 852 [49 L.Ed. 2d 245, 96 S.Ct. 2465]." *Hodel*, at 287–88, 69 L.Ed. 2d 1, 101 S.Ct. 2352."

For statutes that meet each prong of this test, a final inquiry must be made to decide whether "the federal interest advanced [is] such that it justifies state submission." *Ibid.*, at 288 n. 29, 69 L.Ed. 2d 1, 101 S.Ct. 2352, citing *Fry v. United States*, 421 U.S. 542, 44 L.Ed. 2d 363, 95 S.Ct. 1792 (1975); *National League of Cities, supra*, at 856, 49 L.Ed. 2d 245 96 S.Ct. at 2465 (Blackmun J. concurring)" (p. 39).

In this case, a majority of Supreme Court Justices — Brennan presented the majority opinion of the Court; Stevens outlined his own remarks — recognized the

applicability to employees of the State of Wyoming of the federal Age Discrimination in Employment Act. Wyoming adopted a compulsory retirement age for its employees, contrary to provisions in the federal act (for a general overview, see Nancy A. Grace, "EEOC v. Wyoming: Economic Interests Emerge Clad in Tenth Amendment Guise" (1983), 35 *Mercer Law Review* 395; Dean Alfange, Jr., "Congressional Regulation of the 'States Qua States': From National League of Cities to EEOC v. Wyoming" (1983), 6 *Supreme Court Review* 215).

Mr. Justice Burger (dissenting, joined by Justices Powell, Rehnquist and O'Connor) did not hesitate to confirm: "The reserved powers of the states and Justice Brandeis' classic conception of the states as laboratories, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932) (Brandeis J., dissenting), are turned on their heads when national rather than state governments assert the authority to make decisions on the age standard of state law enforcement officers. Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest. Nothing in the Constitution permits Congress to force the states into a Procrustean national mold that takes no account of local needs and conditions. That is the antithesis of what the authors of the Constitution contemplated for our federal system." (103 S. Ct. p. 1075).

His colleague, Mr. Justice Powell, went further, adding: "In sum, all of the evidence reminds us of the importance of the principles of federalism in our constitutional system. The Founding Fathers, and those who participated in the earliest phases of constitutional development, understood the States' reserved powers to be a limitation on Congress's power — including its power under the Commerce Clause. And the court has recognized and accepted this fact for almost 200 years" (103 S.Ct. pp. 1081 and 1082).

In the *Federal Energy Regulatory Commission v. Mississippi* decision, the majority of Supreme Court justices distinguished between the strict, imperative obligation for the states (including their agencies) to apply federal legislation and the situation in which Congress imposes conditions on the state regulation of private conduct. In the first instance, the majority did not deem it opportune to declare whether such conduct by Congress would violate the Tenth Amendment; in the second case, it endorsed Congress's actions (456 U.S. 742, pp. 764 and 765, 769 and 770, 72 L.Ed. 2d 532, 550, 553 and 554 (1982); see William C. Banks, "Conservation, Federalism, and the Courts: Limiting the Judicial Role" (1983), 34 *Syracuse Law Review* 685, pp. 690-717).

In February 1985, the Supreme Court of the United States, in a split decision (5-4), simply dismissed the *National League of Cities* decision by declaring: "We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'" (*Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, p. 1016 (1985) Justice Blackmun). Chief Justice Burger and Mr. Justice Powell (both dissenting) vigorously contested the position adopted by the majority in this case.

230. See *Hodel v. Virginia Surface Mining & Reclamation Association Inc.*, 452 U.S. 264, 277 (1982) and *Halel v. Indiana*, 452 U.S. 314, p. 323 and 324 (1982). For a review of the importance of federal regulation on the functioning of American federalism, see Advisory Commission on Intergovernmental Relations, *Resultory Federalism: Policy, Process, Impact and Reform* (Washington, D.C.: ACIR, 1984).
231. See Smith, *supra*, n. 71, pp. 287-348.
232. *Ibid.*, pp. 256-75.
233. *Ibid.*, p. 408; see also Noel T. Dowling, *Interstate Commerce and State Power* (1940), 27 *Virginia Law Review* 1; Jerome M. Balsam, "The Negative Commerce Clause — A Strict Test for State Taxation of Foreign Commerce" (1980), 13 *New York University Journal of International Law and Politics* 135, pp. 152 and 153; Leavy, *supra*, n. 211, pp. 170 and 171 (jurisprudence cited).
234. 322 U.S. 533 (1944). On the regulation of insurance generally, see Benson, *supra*, n. 216; pp. 147-69; Smith, *supra*, n. 71, pp. 266-73.
235. 328 U.S. 408 (1946).



236. James O'Fallon, "The Commerce Clause: A Theoretical Comment" (1982), 61 *Oregon Law Review* 395, pp. 405 and 406, n. 65. See also *Lewis v. BT Investment Managers, Inc.*, 100 S.Ct. 2009, 2020 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 and 155 (1982).
237. Leavy, *supra*, n. 211, p. 165.
238. Grossman and Wells, *supra*, n. 189, p. 339; Thomas K. Anson and P.M. Schenkkan, "Federalism, the Dormant Commerce Clause and State-Owned Resources" (1980), 59 *Texas Law Review* 71, p. 81; Leon Vance, "State Market Participation Exempt from Commerce Clause Review" (1981), 16 *Land & Water Law Review* 85, p. 87; *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), p. 624; *Southern Pacific Railroad v. Arizona*, 325 U.S. 761 (1945); Schwartz, *supra*, n. 213, pp. 419–21. See also *Philadelphia v. New Jersey*, 437 U.S. 617, 624–27 (1978); *Lewis v. BT Investment Managers Inc.*, 447 U.S. 10, 36 (1980).
239. See *Bibb v. Navajo Freight Lines Inc.*, 359 U.S. 520 (1959); *South Carolina State Highway Department v. Barnwell*, 303 U.S. 117 (1938); and, for a general overview, see Ducat and Chase, *supra*, n. 173, pp. 546–50.
240. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). These criteria have been applied regularly since then: see *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441 and 442 (1978); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 353, (1977); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and, generally, Benson, *supra*, n. 216, pp. 235–75. This formulation of the balance of interests in the commerce clause had been suggested by Supreme Court Justice Stone (dissenting in *Di Santo v. Pennsylvania*, 273 U.S. 34, 44 (1927)) and was adopted by the majority of Supreme Court justices in 1941 in *United States v. Darby*, 312 U.S. 100 (1941).
241. See *Lewis v. Bankers Trust Investment Managers Inc.*, 100 S. Ct. 2009, 2016 (1980).
242. 426 U.S. 794, 810 (1976); see Schwartz, *supra*, n. 213, pp. 421 and 422. The "market participant" exemption developed during the 1970s strongly resembles that of "State and Municipal Tracking" invoked on several occasions by the Supreme Court during the 1920s in order to free the states from the rigid constraints of "substantive due process" in economic matters (see E.E. Steiner, "A Progressive Creed: The Experimental Federalism of Justice Brandeis" (1983), 2 *Yale Law and Policy Review* 1, pp. 43–47).
243. *Reeves Inc. v. Stake*, 100 S. Ct. 2271, 2277 (1980).
244. *White v. Massachusetts Council of Construction Employees*, 103 S. Ct. 1042 (1983).
245. *Ibid.*, p. 1044, citing *Reeves Inc. v. Stake*, 100 S. Ct. 2271, 2277, n. 7 (1980). See also *United Building and Construction Trades Council v. Mayor of Camden*, 104 S. Ct. 1020 (1984).
246. 104 S. Ct. 2237 (1984).
247. *Ibid.*, pp. 2245 and 2246.
248. *Ibid.*, p. 2246.
249. *Ibid.*, p. 2245.
250. See *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S. Ct. 599 (1977); *Armco Inc. v. Hardesty*, 104 S. Ct. 2620 (1984); *Westinghouse Electric Corporation v. Tully*, 104 S. Ct. 1856 (1984); *Maryland v. Louisiana*, 451 U.S. 725, 101 S. Ct. 2114 (1981); *Lewis v. BT Investment Management Inc.*, 447 U.S. 27, 100 S. Ct. 2009 (1980); *Nippert v. City of Richmond*, 327 U.S. 416 (1946); see Hellerstein, *supra*, n. 185, pp. 119 and 120.
251. For a general overview, see J.R. Hellerstein, "State Taxation Under the Commerce Clause: An Historical Perspective" (1976), 29 *Vanderbilt Law Review* 335; Hellerstein, *supra*, n. 185, p. 120 et seq.; Leavy, *supra*, n. 211, pp. 175–77; Hunter, *supra*, n. 201, pp. 98 and 99; *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983); *ASARCO, Inc. v. Idaho State Tax Commission*, 102 S. Ct. 3103, 73 L. Ed. 2d 787 (1982); *F.W. Woolworth Co. v. Taxation and Revenue Department*, 102 S. Ct. 3128, 73 L. Ed. 2d 819 (1982); *Exxon Corp. v. Wisconsin Department of Revenue*, 447 U.S. 207, 100 S. Ct. 2109, 65 L. Ed. 2d 66 (1980); *Mobil Oil Corporation v. Commissioner of Taxes*, 445 U.S. 425, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980); *Moorman Mig Co. v. Bair*, 437 U.S. 267, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978);

- General Motors Corporation v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964); *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1984-2); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*, 226 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920); Hartman, *supra*, n. 201.
252. Hunter, *supra*, n. 201, pp. 428–30; *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977); Hellerstein, *supra*, n. 185, pp. 118 and 119; Benson, *supra*, n. 216, pp. 319 et seq. and 330 et seq.
253. *Henneford v. Silas Mason Company*, 300 U.S. 577 (1937); *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976); Benson, *supra*, n. 216, p. 322 et seq.
254. *General Motors v. Washington*, 377 U.S. 346 (1964); *Standard Pressed Steel Company v. Department of Revenue*, 419 U.S. 560 (1975); Hellerstein, *supra*, n. 185, pp. 122 and 123; Benson, *supra*, n. 216, p. 326 et seq.; *Complete Auto Transit Inc. v. Brady*, 423 U.S. 276 (1977); *Department of Revenue of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978).
255. *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 288 citing *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) and *Colonial Pipeline Co. v. Traigle*, (421) U.S. 100, 108 (1975).
256. *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602 (1951); *Freeman v. Hewitt*, 329 U.S. 249 (1946); Hunter, *supra*, n. 201, pp. 94–96.
257. 430 U.S. 274, 97 S. Ct. 1076 (1977); Laura Treadgold Oles, *Constitutional Law — The Scope of the Commerce Clause in International Commerce* (1980), 55 *Washington Law Review* 885, p. 887; and Schwartz, *supra*, n. 213, pp. 427–38.
258. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, pp. 618–29, 101 S. Ct. 2946 (1981); see Peter H. Barnett, “State Taxation of Energy Resources After Commonwealth Edison Co. v. Montana” (1983), 34 *Syracuse Law Review* 657.
259. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, pp. 615–17; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980); Hunter, *supra*, n. 201, p. 106.
260. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 444–51 (1979). For a general overview, see Harold J. Gross, “The Constitutionality of State Ad Valorem Tax Exemptions for Foreign Commerce” (1981), 18 *American Business Law Journal* 569.
261. *Hines v. Dadidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941).
262. William W. Bratton Jr., “The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court” (1975), *Columbia Law Review* 623, p. 624 et seq.; Benson, *supra*, n. 216, pp. 277–317; *Silkwood v. Ken McGee Corp.*, 104 S. Ct. 615 (1984); *Pacific Gas Electric Co. v. State Energy Resources Conservation and Development Commission*, 103 S. Ct. 1713 (1983); *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S. Ct. 3014 (1982); *Aloha Airlines v. Director of Taxation of Hawaii*, 104 S. Ct. 291 (1983).
263. 93 S. Ct. 1854 (1973).
264. Most of the remarks which follow have been taken from J.M. Hayes, *supra*, n. 80, p. 99 et seq.
265. *Mulford v. Smith*, 307 U.S. 38 (1939); *United States v. Rock Royal Co-operative*, 307 U.S. 533 (1939); *Hood v. United States*, 307 U.S. 588 (1939); *United States v. Wrightwood Dairy*, 315 U.S. 110 (1942); *Wickark v. Filburn*, 317 U.S. 111 (1942); Hayes, *supra*, n. 80, p. 99; and Kelly, et al., *supra*, n. 189, pp. 505–507.
266. 447 U.S. 27, 44, 64 L. Ed. 2d 702, 716; 100 S. Ct. 2009 (1980); see Bevin R. Alexander Jr., “*Lewis v. BTIM*: State Regulation, the Bank Holding Company Act and the Commerce Clause” (1981), 38 *Washington and Lee Law Review* 231.
267. For a history of the American banking system see John J. Knox, *A History of Banking in the United States* (New York: A.M. Kelley, 1969); Ray B. Westerfield, *Historical Survey of Branch Banking in the United States* (New York: Arno Press, 1980); George E. Barnett, *State Banking in the United States since the Passage of the National Bank Act* (New York: AMS Press, 1983); William J. Brown, *The Dual Banking System in the United States* (New York: American Bankers Association,



Department of Economics and Research, 1968); Douglas Ginsburg, *Interstate Banking* (Cambridge, Mass.: Harvard University, Center for Policy Research, 1982); John M. Chapman and Ray B. Westerfield, *Branch Banking: Its Historical and Theoretical Position in America and Abroad* (New York: Arno Press, 1980).

With respect to the efforts aimed at deregulation of the American financial system, see S. Kerry Cooper and Donald R. Fraser, *Banking Deregulation and the New Competition in Financial Services* (Cambridge, Mass.: Ballinger, 1984); Thomas F. Cargill and Gillian G. Garcia, *Financial Reform in the 1980s* (Stanford, Cal.: Hoover Institution Press, 1985); Emmanuel S. Roussakis, *Commercial Banking in an Era of Deregulation* (New York: Praeger, 1984); *Depository Institutions Deregulation and Monetary Control Act of 1980*, Public Law 96-221, March 31, 1980; *Garn - St. Germain Depository Institutions Act of 1982*, Public Law 97-320, October 15, 1982.

268. Hayes, *supra*, n. 80, p. 100; see Bernard Schwartz (ed.), *The Economic Regulation of Business and Industry*, vol. 3 (New York: Chelsea House Publishers in collaboration with R.R. Bowker Co., 1973), p. 1073 et seq.; Smith, *supra*, n. 71, pp. 258 and 259.
269. Smith, *supra*, n. 71, p. 257 et seq.
270. 118 U.S. 557, p. 577 (1886); see Kelly, et al., *supra*, n. 189, 383-86 and 435-38.
271. Hayes, *supra*, n. 80, pp. 107 and 108; Schwartz, *supra*, n. 268, vols. 1 and 2; Marvin L. Fair, *Economic Considerations in the Administration of the Interstate Commerce Act* (Centreville, Md.: Cornell Maritime Press, 1972); Smith, *supra*, n. 71, pp. 240-43.
272. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). With respect to railway regulation, see also *City of Chicago v. Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77 (1958); *Railroad Transfer Service Inc. v. City of Chicago*, 386 U.S. 351 (1967).
273. *South Carolina State Highway Department v. Barnwell Brothers* 303 U.S. 177 (1938); compare with *Castel v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954); *Raymond Motor Transportation Inc. v. Rice*, 98 S. Ct. 987 (1978). See also *Bipp v. Navajo Freight Lines*, 359 U.S. 529 (1959); Schwartz, *supra*, n. 213, pp. 413-16. See also Neal Dunning, "Raymond Motor Transportation, Inc. v. Rice: Death Knell for the Reasonableness Test in Interstate Commerce" (1978), 10 *Transportation Law Journal* 229.
274. With respect to railway transportation, see, for example, *Railway Revitalization and Regulatory Reform Act of 1976*, Public Law 94-210, February 5, 1976 and *Staggers Rail Act of 1980*, Public Law 96-448, October 14, 1980. With respect to airline transportation, see *Airline Deregulation Act of 1978*, Public Law 95-504, October 24, 1978, and for highway transportation, see *Motor Carrier Act of 1980*, Public Law 96-296, July 1, 1980, and *Bus Regulatory Reform Act of 1982*, Public Law 97-261, September 20, 1982.
275. *Cort v. Ash*, 422 U.S. 66, p. 84 (1975). See Alison Grey Anderson, "The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934" (1984), 70 *Virginia Law Review* 813; Edmund W. Kitch, "Federal Vision of the Securities Laws" (1984), 70 *Virginia Law Review* 857.
276. See Schwartz, *supra*, n. 268, vol. 4, p. 2547 et seq.; Walter Werner, "The SEC as a Market Regulator" (1984), 70 *Virginia Law Review* 755; Donald L. Calvin, "The National Market System: A Successful Adventure in Industry Self-Improvement" (1984), 70 *Virginia Law Review* 785.
277. Schwartz, *supra*, n. 268, vol. 4, p. 2547 et seq.; *Edgar v. MITE Corp.*, 102 S. Ct. 2629 (1982); Robert A. Profusek and Henry L. Gomptf, "State Takeover Legislation after MITE: Standing Pat, Blue Sky, or Corporation Law Concepts?" (1984), 7 *Corporation Law Review* 3; Eileen W. Van Roeyen, "Validity, Under Commerce Clause of Federal Constitution of State Statutes Regulating Securities Transactions — Federal Cases" 73 L. Ed. 1454.
278. Benson, *supra*, n. 216, pp. 111-46; Corwin, *supra*, n. 176, p. 65 et seq.; Hayes, *supra*, n. 80, p. 104.
279. *National League of Cities v. Usery*, 426 U.S. 833 (1976).
280. *Equal Employment Opportunity v. Wyoming*, 103 S. Ct. 1054 (1983).

281. Hayes, *supra*, n. 80, pp. 104–106.
282. *Constitution of the United States*, art. 1(8) 4th paragraph; Hayes, *supra*, n. 80, p. 101; *Railway Labor Executives' Association v. Gibbons*, 455 U.S. 457, p. 468 (1982). For a general overview, see Kathleen A. Bussart, "Authority of Congress Under Bankruptcy Clause of Federal Constitution to Legislate on the Subject of Bankruptcies — Federal Cases," 71 L. Ed. 2d 905.
283. Hayes, *supra*, n. 80, p. 97; Smith, *supra*, n. 71, pp. 245 and 246.
284. 317 U.S. 341 (1943).
285. For a general overview, see William H. Page, "Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After *Midcal Aluminium*" (1981), 61 *Boston University Law Review* 1099.
286. *California Retail Liquor Dealers Association v. Midcal Aluminium*, 445 U.S. 97 (1980).
287. The U.S. Congress adopted the Local Government Antitrust Act of 1984 (Public Law 98–544) in order to extend the scope of the theory of the "state action exemption" to local administrations. Congress's decision reversed the U.S. Supreme Court's refusal to extend the defence of the "state action exemption" to individuals complying with the decisions of local administrations "*Community Communications Co. Inc. v. City of Boulder* (Col.), 455 U.S. 40 (1981). See also John Cirace, "An Economic Analysis of the State-Municipal Action Antitrust Cases" (1982), 61 *Texas Law Review* 481.
288. See Hayes, *supra*, n. 80, pp. 115 and 116. See "Buy American Laws — Invalidity of State Attempts to Favor American Producers" (1979), 64 *Minnesota Law Review* 389; W.C. Graham, "Government Procurement Policies: GATT, the EEC, and the United States" in M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene and J. Whalley (eds.) *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press for the Ontario Economic Council, 1983), pp. 355 and 383ff.
289. *Gerr v. Connecticut*, 161 U.S. 519 (1896); *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Toomer v. Witsell*, 334 U.S. 385 (1948); *contra City of Altas v. Can.*, 87 S. Ct. 240. The theory of community property applies solely to resources which cannot be privately owned (as defined by State laws) and essentially covers water and terrestrial and aquatic fauna.
290. *Gerr v. Connecticut*, 161 U.S. 519 (1896).
291. 441 U.S. 322, p. 329 (1979). See also *Sporhase v. Nebraska ex. rel. Douglas*, 102 S. Ct. 3456, 3461 (1982).
292. 221 U.S. 229 (1911).
293. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). In the *West* and *Pennsylvania* decisions, the ownership of gas subjected to the restriction had, however, been privatized at the time it was drawn from the ground (see *City of Philadelphia v. New Jersey*, 98 S. Ct. 2531, 2537 (1976)).
294. 102 S. Ct. 1096 (1982). It should be noted that the residents of another State may not claim a more favourable treatment than that accorded residents of the regulating or taxing State concerned (see *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619, [1982]).
295. *Sporhase v. Nebraska ex. rel. Douglas*, 102 S. Ct. 3456 (1982); Joseph Kelly, "Constitutionality of Water Export Ban and Limitations of Interstate Water Allocation *Sporhase v. Nebraska ex. rel. Douglas* — U.S. 102 S. Ct. 3456 (1982)" (1983), 18 *Land & Water Law Review* 553, pp. 562–64; Anne B. Tallmadge, "*Sporhase v. Nebraska ex. rel. Douglas*: State Control of Water Under the Constraints of the Commerce Clause" (1983), 18 *Land and Water Law Review* 513; Dean K. Vallière, "Environmental Law — Ground Water — The Demise of the Public Ownership Theory in State Regulation of Water Resources, *Sporhase v. Douglas*, 102 S. Ct. 3456 (1982)" (1983), 7 *Suffolk Transnational Law Journal* 223; "*Sporhase v. Nebraska ex. rel. Douglas* [102 S. Ct. 3456]: An Imitation to a Federal Water Policy?" (1983), 29 *Loyola Law Review* 439; *Reeves Inc. v. Stake*, 100 S. Ct. 2271 (1980); Anson and Schenkkan, *supra*, n. 238 and Vance, *supra*, n. 238.
296. See *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982).



297. See H. Burmester, *supra*, n. 158, pp. 267 and 268. Richard Loss (ed.), *Corwin on the Constitution* (Ithaca, N.Y.: Cornell University Press, 1981), p. 233 et seq.; “Buy American Laws — Invalidity of State Actions to Favor American Products” (1979), 64 *Minnesota Law Review* 389, p. 406 et seq.
298. *New Hampshire v. Maine*, 426 U.S. 363, p. 369 (1976) by Justice Field, cited with approval by Justice Powell in *U.S. Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452, p. 471 (1978).
299. This subsection dealing with the free movement of persons is drawn essentially from works by John B. Laskin, “Personal Mobility in the United States and the EEC” in M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene and J. Whalley (eds.), *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press for the Ontario Economic Council, 1982); Hayes, *supra*, n. 80; and Benson, *supra*, n. 216.
300. *Gibbons v. Ogden*, 9 Wheat. (1824). See also *Hoke v. United States*, 227 U.S. 308 (1913) and Benson, *supra*, n. 216, p. 192.
301. 314 U.S. 160 (1941).
302. *Morgan v. Virginia*, 328 U.S. 373 (1946); Benson, *supra*, n. 216, pp. 194–231.
303. 383 U.S. 745, 759 (1966), quoted in Laskin, *supra*, n. 299, p. 460.
304. Hayes, *supra*, n. 80, pp. 118 and 199 and Laskin, *supra*, n. 299, p. 461.
305. *Corfield v. Coryell*, 6 Fed. Cas. 546 (1823).
306. Laskin, *supra*, n. 299, p. 458.
307. *McCready v. Virginia*, 94 U.S. 391 (1876).
308. *Hicklin v. Orbeck*, 437, U.S. 518, 529 (1978), quoted in Laskin, *supra*, n. 299, p. 459.
309. *Toomer v. Witsell*, 334 U.S. 385 (1945), discussed in Laskin, *supra*, n. 299, p. 460.
310. Laskin, *supra*, n. 299, p. 460.
311. 436 U.S. 371 (1978).
312. Laskin, *supra*, n. 299, p. 461.
313. *Shapiro v. Thompson*, 394 U.S. 618 (1969). See J. Leavy, “A Different and More Viable Theory and Equal Protection” (1978), 57 *North Carolina Law Review* 1.
314. Laskin, *supra*, n. 299, p. 467.
315. *Shapiro v. Thompson*, 394 U.S. 618, 641 and 642 (1969).
316. Laskin, *supra*, n. 299, p. 463.
317. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), quoted in Laskin, *supra*, n. 299, p. 463.
318. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Memorial Hospital v. Marilepa County*, 415 U.S. 250 (1974); *contra Sasna v. Iowa*, 419 U.S. 393 (1975). For a general overview, see Laskin, *supra*, n. 299, pp. 463–67.
319. See Paul L. Posner and Stephen M. Sorrett, “A Crisis in the Fiscal Commons: The Impact of Federal Expenditures on State and Local Governments” (1978) 10 *Public Contract Law Journal* 341; Mark Suben, “Federal Grants and the Tenth Amendment: ‘Things as They Are’ and Fiscal Federalism” (1981), 50 *Fordham Law Review* 130; “Taking Federalism Seriously: Limiting State Acceptance of National Grants” (1981), 90 *Yale Law Journal* 1964; Michael Spencer Kolker, “National League of Cities, the Tenth Amendment, and the Conditional Spending Power” (1981), 21 *Urban Law Annual* 217; Lewis B. Kaden, “Politics, Money, and State Sovereignty: The Judicial Role” (1979), 79 *Columbia Law Review* 847; Kingman Brewster, “Does the Constitution Care About Coercitive Federal Funding?” (1983), 34 *Case Western Reserve Law Review* 1; Loss, *supra*, n. 297, p. 246 et seq.
320. See the abundant jurisprudence cited in this respect by M.S. Kolker, *supra*, n. 319, p. 221, n. 19.
321. M. Suben, *supra*, n. 319, p. 134.
322. *United States v. Butler*, 297 U.S. 9 (1936). L.B. Kaden, *supra*, n. 319, pp. 871 and 872; Dupont, *supra*, n. 25, pp. 71–75; *Helwing v. Davis*, 301 U.S. 640 (1937). See D.B. Lapierre, “The Political Safeguards of Federalism: Intergovernmental Immunity and the States as Agents of the Nation” (1982), 60 *Washington University Law*

*Quarterly* 779, pp. 823–65. In the early 1980s, federal grants represented about one fifth of state expenditures (see Mr. Justice Blackmun's remarks in *Garcia v. San Antonio Metropolitan Transit Authority*, Supreme Court of the United States, February 19, 1985, pp. 23 and 24).

With regard to the evolution of fiscal federalism in the U.S., see George F. Break, "Fiscal Federalism in the United States: The First 200 Years, Evolution and Outlook" in Advisory Commission on Intergovernmental Relations, *The Future of Federalism in the 1980s* (Washington, D.C.: ACIR, 1981), pp. 39–65.

323. See Michael D. Reagan, *The New Federalism* (New York: Oxford University Press, 1972), p. 3; Donald H. Haider, "The Intergovernmental System" (1981), 34 *Academy of Political Science Procedures* 20; David B. Walker, "Dysfunctional Federalism — The Congress and Intergovernmental Relations" (1981), 54 *State Government* 53; L.B. Kaden, *supra*, n. 319, p. 871 et seq. For a review of the expansion of the central government's activities, see Advisory Commission on Intergovernmental Relations, *The Federal Role in the Federal System: The Dynamics of Growth*, 11 volumes (Washington, D.C.: ACIR).

324. See Posner and Sorrett, *supra*, n. 319, pp. 344–46; D.H. Haider, "Intergovernmental Redirection" (1963), 466 *Annals of the American Academy* 165, pp. 167–70; see also Advisory Commission on Intergovernmental Relations, *The Role of Equalization in Federal Grants* (New York: Arno Press, 1978); ACIR, *Categorical Grants: Their Role and Design* (Washington, D.C.: ACIR, 1978); ACIR, *General Revenue Sharing: An ACIR Reevaluation* (Washington, D.C.: ACIR, 1974).

To the federal government's financial assistance programs must be added the break-up, during the 1970s, of federal regulatory requirements which the states must comply with, without compensation (ACIR, *supra*, n. 230).

325. See Rochelle L. Standfield, "'Turning Back' 61 Programs: A Radical Shift of Power" (1982), 14 *National Journal* 369; John William Ellwood (ed.), *Reductions in U.S. Domestic Spending* (New Brunswick, N.J.: Transaction Books, 1982).

The redirection of intergovernmental relations had been undertaken in the 1960s under President Lyndon B. Johnson, then accelerated under Presidents Richard Nixon and Jimmy Carter (with respect to regulatory reform, see Advisory Commission on Intergovernmental Relations, *supra*, n. 230, chap. 6).

326. Daniel W. Preston, "New Federalism and an Old Dilemma" (1982), 2 *Chase Economic Observer* 5, p. 6. For a general overview of the "new federalism," see "Renewing Federalism: A Continuing Appraisal" (1982), 71 *National Civic Review* 491–535 (Special Issue); David H. McKay, "Fiscal Federalism, Professionalism and the Transformation of American State Government" (1982), 60 *Public Administration* (London) 10; "Special Report: New Federalism — How Cities and States Will Be Hit" in *U.S. News & World Report*, February 8, 1982, pp. 26–32; Joanne Davidson, "Are the States Ready for New Federalism?" in *U.S. News & World Report*, March 29, 1982, pp. 54 and 55; "Symposium: The New Focus of Federal Fiscal Policies and Implications for State and Local Governments" (1981), 34 *National Tax Journal* 285–397; Albert Davis and Robert Lucke, "The Rich State–Poor State Problem in a Federal System" (1982), 35 *National Tax Journal* 337–63; "Transferring Power — A Special Report — Reagan's New Federalism Trojan Horse or Gift Horse?" (1982), 14 *National Journal* 356–83; John Shannon, "New Federalism; Perspective and Solutions" (1982), 11 *Government Finance* 9. With respect to American federalism, see Harry N. Scheiber, "Federalism and Legal Process: Historical and Contemporary Analysis of the American System" (1980), 14 *Law Society Review* 663; Philip J. Prygoski, "Supreme Court Review of Congressional Action in the Federalism Area" (1980), 18 *Duquesne Law Review* 197.

327. Haider, *supra*, n. 323, pp. 176 and 177.

328. See Richard P. Nathan and Fred C. Doolittle, "Overview: Effects of the Reagan Domestic Program on States and Localities" (Princeton, N.J.: Princeton University, Princeton Urban and Regional Research Center, the Woodrow Wilson School, June 1984), pp. 2 and 3, 35–40 and 89.

Richard P. Nathan and Fred C. Doolittle, *The Consequences of Cuts* (Princeton, N.J.: Princeton University, Princeton Urban and Regional Research Center, the Woodrow Wilson School, 1983).



329. See Ziegel, *supra*, n. 64; Ronald C.C. Cuming, "The Harmonization of Law in Canada: An Overview," in *Perspectives in the Harmonization of Law in Canada*, volume 55 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
330. *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2496 (1981); *Merrion v. Jiracilla Apache Tribe*, 455 U.S. 130, 102 S. Ct. 894 (1982) (this decision concerns the Indian tribes' taxation powers); *Container Corporation of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). Hunter, *supra*, n. 201, p. 121.
331. Hunter, *supra*, n. 201, p. 125. See *Asarco v. Idaho Tax Commission*, 102 S. Ct. 3103 (1982); *F.W. Woolworth v. Taxation and Revenue Department*, 102 S. Ct. 3128 (1982).
332. "Considering that world peace can be safeguarded only by creative efforts commensurate with the dangers that threaten it,  
"Convinced that the contribution which an organised and vital Europe can make to civilisation is indispensable to the maintenance of peaceful relations, . . .  
"Resolved to substitute for age-old rivalries the merging of their essential interests; to create by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflict; and to lay the foundations for institutions which will give direction to a destiny henceforward shared."
333. "Draft Treaty Embodying the Statute of the European Community," (Paris: Service des publications de la Communauté européenne, 1953), p. 55. The preamble contained much of the wording of the ECSC, as well as the following:  
"Determined to safeguard by our common action the dignity, freedom and financial equality of men of every condition, race or creed . . .  
"Determined to invite other European peoples, inspired with the same ideal, to join us in our endeavour."
334. See, for example: *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)*, [1964] C.M.L.R. 425. See also: "The Mutton and Lamb Story" (1980), 17 *Common Market Law Review* 311.
335. A. Easson, "Cheaper Wine or Dearer Beer? Article 95 again" (1984), 9 *European Law Review* 57, commenting on, *Re Excise on Wine (No. 2) Commission v. United Kingdom*, [1983] C.M.L.R. 512.
336. As a result of the "Luxembourg Accord" of January 1966, it was agreed that if any member state declared that a decision on matter before the council was of "vital interest" to it, the member state would have a veto.
337. European Community regulations apply in the same manner as domestic statutes. That is, they have direct effect within each member state and create rights and obligations for individuals. Like statutes, they remain in force until amended or repealed. Hence, each set of regulations simply states the date on which it is to take effect. See, for example, the regulation on agricultural pricing, No. 2727/75, Official Journal, 1975, L. 281/1, Art. 31.
338. *Procureur du Roi c. Benoit et Gustave Dassouville*, case 8/74, *Recueil*, 1974, p. 837.
339. *Adrian de Peijper*, case 104/75, *Recueil*, p. 613.
340. *Rewe Zentrale AG c. Bundesmonopolverwaltung für Branntwein*, case 120/78, *Recueil*, 1979, 649.
341. Criminal Proceedings against *J.F. Robertson*, case 220/81, [1983] 1 *CMLR* 559.
342. For a comparative view, see the special issue of *Revue d'intégration européenne/Journal of European Integration* 3 (3) (1980).
343. European Community, *Journal officiel*, December 18, 1961, 32/62 and *Journal officiel*, December 21, 1976, L13/1 (15.1, 1977).
344. Case 2/74, *Recueil* 1974, p. 631.
345. Case 33/74, *Recueil* 1974, p. 1299.
346. *Commission v. Belgium*, case 149/79, [1980] *ECR* 3881.
347. *Levin v. Staatssecretaris van Justitie*, case 53/81 [1982] *ECR* 1035.
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- Economic Community and Canada*, edited by Tom J.M. Zujiidwick (Montreal: McGill University, Institute of Comparative Law), p. 113.
350. Dominik Lasok, "The Application of European Competition Policy: The Caselaw of the Court of Justice," in *ibid.*, p. 113.
  351. Alex J. Easson, "Approximation and Unification of Laws in the E.E.C." (1979), 2 *Revue d'intégration européenne/Journal of European Integration* 375 at 377.
  352. *Supra*, note 340.
  353. Laurence Gormley, "Cassis de Dijon and the Communication from the Commission" in *Current Survey* (1981), 6 *European Law Review* 454 at 458.
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  355. W.A. Axline, "Underdevelopment, Dependence and Integration: The Politics of Regionalism in the Third World" (1977), 31 *International Organization* 83-105. Also H. Bourguinat, *Les Marchés communs des pays en voie de développement* (Geneva: Librairie Droz, 1968).
  356. For a review, see A. Brahimi, *Dimensions et perspectives du monde Arabe* (Paris: Economica, 1977), ch. 2.
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  358. A. Bougi, "Organisations régionales" dans *Annuaire du Tiers-Monde* 6 (1979-80) (Paris: ISTR, 1981), pp. 359-60.
  359. On LAFTA see S. Dell, *A Latin American Common Market?* (London: Oxford University Press, 1966).
  360. M. Wionczek, "The Central American Common Market" in P. Robson (ed.), *International Economic Integration* (Harmondsworth: Penguin, 1972), pp. 403-13.
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  362. Carraud, *supra*, note 361, pp. 26-27, 35. Wionczek, *supra*, note 360, p. 405.
  363. M. Kahler, "Europe and its 'Privileged Partners' in Africa and the Middle East," in L. Tsoukalis (ed.), *The European Community: Past, Present and Future* (Oxford: Basil Blackwell, 1983), p. 205.
  364. S. Olofin, "ECOWAS and the Lomé Convention" *Journal of Common Market Studies* 16 (September 1977): 53-72.
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  367. A. Touré, "Structures économiques et intégration africaine" (1982), 13 *Études Internationales* 520. See also K. Ouali, *Intégration africaine: le cas de la CÉAO* (Paris: Economica, 1982).
  368. *Le Monde*, 2 novembre 1983.
  369. Carraud, *supra*, note 361, p. 35.
  370. *Ibid.*, pp. 122-25.
  371. See E.C. Cale, "LAFTA's Future" in Robson, *supra*, note 290, pp. 436-41, and Carraud, *supra*, note 361, pp. 28-29.
  372. On the Regime for Integration Industries, see Wionczek, *supra*, note 293, p. 306.
  373. Carraud, *supra*, note 361, pp. 151-58.
  374. S. Drummond, "ASEAN: the Growth of an Economic Dimension," *World Today*, January 1979.



375. Mace, *supra*, note 361. See also R. Vargas-Hidalgo, "The Crisis of the Andean Pact: Lessons for Integration Among Developing Countries," *Journal of Common Market Studies* 17 (March 1979).
376. Bougi, *supra*, note 358.
377. Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Commission), *Report*, vol. 2, *Recommendations*, p. 65.







# The Free Flow of Goods in the Canadian Economic Union

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## Introduction

In this paper we survey the issue of mobility of goods within Canada and discuss briefly the underlying economic rationale for a strong domestic economic union. We then look at major barriers to the free flow of goods: federal, federal-provincial, and provincial barriers. In each case we provide a short description of the impediment and then identify the constitutional powers that allow the creation of these barriers, including any legal constraints upon the exercise of these powers. Finally, we suggest some justifications for barriers and conclude with an assessment of the need for change.

## The Canadian Economic Union

The formation of an economic union was one of the major objectives of the designers of Confederation. They believed that the colonies had complementary advantages that could be integrated in the new country.<sup>1</sup> Although the Constitution does not speak of an economic union, it contains the elements of one.

In addition to the opening clause of section 91 of the *Constitution Act, 1867*, which allows the federal Parliament to “make laws for the peace, order, and good government of Canada” with respect to matters not assigned exclusively to the provinces, major economic powers are allocated to the federal government:

- s. 91(1A) — the public debt and property;
- s. 91(2) — trade and commerce;
- s. 91(3) — the raising of money by any mode or system of taxation;

- s. 91(4) — the borrowing of money on the public credit;
- s. 91(14) — currency and coinage;
- s. 91(15) — banking, incorporation of banks, and the issue of paper money;
- s. 91(16) — savings banks;
- s. 91(18) — bills of exchange and promissory notes;
- s. 91(19) — interest;
- s. 91(20) — legal tender;
- s. 91(21) — bankruptcy and insolvency.

Under section 92(10)(a), Parliament also has jurisdiction to regulate interprovincial transportation and communications enterprises and under section 92(10)(c), works declared to be for the general advantage of Canada.

Economic powers allocated to the provinces are set out in section 92 of the Act:

- s. 92(2) — direct taxation within the province in order to raise revenue for provincial purposes;
- s. 92(3) — the borrowing of money on the sole credit of the province;
- s. 92(5) — the management and sale of public lands belonging to the province;
- s. 92(10) — local works and undertakings;
- s. 92(11) — incorporation of companies with provincial objects;
- s. 92(13) — property and civil rights in the province;
- s. 92(16) — generally all matters of a merely local or private nature in the province.
- s. 92A — non-renewable natural resources, forestry resources, and electrical energy

Additional provisions establish a Canadian customs union. Section 121 states:

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

As we shall discuss later, section 121 has been interpreted as prohibiting tariff barriers between provinces. Section 122 permitted Parliament to establish an external tariff.<sup>2</sup> Thus a classic customs union is established with no internal border taxes and a single external tariff.

In recent years a number of commentators have expressed concern about a segmented Canadian common market.<sup>3</sup> Just as the principles of specialization and gain from trade explain the benefits of economic integration, so the converse principles explain the dangers of protectionist or distortionary measures. When economic barriers are set up, the size of the market is reduced, and the opportunities for higher productivity that come from specialization, economies of scale and



greater volume of trade are reduced. Barriers therefore reduce the potential real income for consumers and income earners. One of the effects of barriers is to redistribute national economic activity in an inefficient way from lower- to higher-cost supply sources. In this way the gross national product (GNP) is reduced below its potential.<sup>4</sup>

Not only do barriers reduce total national income but they also correspondingly diminish Canada's ability to compete in international markets. Canada has a smaller domestic market than most of her trading partners. To fragment an already small market with barriers to the movement of goods is to risk substantial inefficiency and to undermine international competitiveness.<sup>5</sup> At a time when Third World, "low-cost" countries are providing goods at highly competitive prices, it is argued that Canada cannot afford internal distortionary policies that prevent the realization of economies of scale which would, in turn, result in lower-priced products. There is also the fear that domestic and foreign investors are discouraged from investing in a segmented market and that internal barriers reduce the likelihood of Canada benefiting from any gains in the General Agreement on Tariffs and Trade (GATT) negotiations.<sup>6</sup>

In practical terms, however, a recent attempt to quantify the costs of barriers to trade suggests that their economic significance may have been greatly exaggerated in policy discussions. Trebilcock and Whalley estimate that the cost of barriers is less than one percent of the GNP.<sup>7</sup>

Courchene, nevertheless, argues that concerns regarding the common market are warranted.<sup>8</sup> In his view the calculation procedure used by Trebilcock and Whalley underestimates the real costs of barriers because it ignores the costs of lobbying to maintain preferential treatment and also any costs associated with fragmentation. For example, because the market is fragmented, firms may be smaller than they would be otherwise. Protection can lead to complacency: firms need not be efficient in order to obtain contracts if governments treat them preferentially. There is less reward for innovative behaviour if non-tariff barriers prevent access to larger markets. These sorts of costs tend to be ignored or at least underplayed by techniques that focus on the estimates of static costs. Finally, says Courchene, there is concern about the future of the Canadian economic union if there are no provisions to prevent further fragmentation. Even so, measurements of these more comprehensive costs may indicate that barriers are not very costly.

Assuming that improvement of the Canadian economy does demand that goods move freely within the country, what is a "distortion," a "barrier," or an "impediment" to the free movement of goods? We use these words interchangeably throughout this paper.

Prichard and Benidickson offer a useful definition:

An economic distortion is any policy which interferes with resource allocation functions of the market, preventing free flow of capital, labour or goods and reducing advantages from specialization and exchange.<sup>9</sup>

This definition is helpful because it includes explicit as well as implicit discriminatory policies. It also incorporates the reason for the costs of barriers, that is, that the gains from trade are not realized. However, we do not intend to include under this definition all policies affecting the mobility of goods. Public ownership and certain regulatory policies, for example, can affect trade between the provinces; but they are not necessarily harmful to the Canadian economic union. Our definition of a barrier is not as all-inclusive as that agreed upon by members of the European Economic Community. Article 3 of the Treaty of Rome prohibits “customs duties and . . . quantitative restrictions on the import and export of goods, and . . . all other measures having equivalent effect.” In our opinion, federal and provincial policies that incidentally affect interprovincial trade are tolerable. However, policies that are intended primarily to discriminate against regions or provinces must be condemned as contrary to the nature of Canadian federalism and the concept of an economic union.

It is also important to distinguish between “free trade” and a “free market.” Our discussion of distortions or barriers should not be mistaken as reflecting a general position against government intervention in the economy. Governments have become increasingly involved in economic matters largely because the “free market” has failed in certain ways and also because governments wish to pursue other, non-economic goals. For example, the market system is inefficient in supplying public goods and services because it has no effective means of channelling funds into them. Also, the market, at both the individual and aggregate levels, experiences problems that governments are called upon to solve. An absolutely “free” market, in fact, no longer exists. In this paper we focus on government policies that are intended to affect interprovincial free trade, that is, the free movement of goods within the context of a mixed economy.

## **The Roots of Grievance: Federal Distortions**

In September 1980, the prime minister and the premiers spent the better part of a day debating constitutional amendments in an area titled “Powers over the Economy.”<sup>10</sup> The issues were narrowed to mobility rights, competition policy, product standards, and the free flow of goods, services, labour and capital. The federal government and some of the provinces saw interprovincial trade barriers as being on the increase — to the detriment of the national economy.<sup>11</sup> For the most part, however, the premiers spoke of grievances and discrimination rooted in the national policy. In only a few, isolated instances was a positive argument made for provincial protectionist policies.<sup>12</sup>

The Saskatchewan government countered the federal government’s position on provincial trade barriers with the following argument:



We see the federal aim being taken at the explicit barriers that obviously impede movements among the provinces. The “big” economic levers such as tax rates, tariff and transportation policies, would not be brought into question. But, these major economic levers are precisely the forces having the greatest impact on the mobility of resources and products in Canada. And, the richest provinces have the greatest capacity to use such instruments to attract business away from other provinces. The only defence available to a small province may be to take action which creates barriers to protect its competitive position within the economic union — and the federal objective is to ensure that the Constitution would not permit the explicit barriers while leaving untouched the more powerful economic levers.<sup>13</sup>

In fact, an analysis of recent economic data confirms Saskatchewan’s proposition that federal policies affect interprovincial trade flows much more than do provincial policies. Whalley estimates that the effects of energy policies, equalization, and federal taxes, including the tariff, far outweigh the effects of interprovincial trade barriers.<sup>14</sup>

In this study we examine four federal policies affecting interprovincial trade:

- energy policies;
- the tariff;
- the federal tax system; and
- freight rates.

There are other federal policies that are explicitly distortionary, such as the regionally differentiated unemployment insurance benefits and regional development policies, but these are relatively insignificant compared to the impact of the four policies listed above. Let us see now how these policies are distortionary and what powers Parliament exercises to create them.

## *Energy Policies*

The National Energy Policy (NEP) established in 1980 by the Trudeau government has three basic goals:

- security of energy supply;
- fairness in pricing and revenue-sharing; and
- Canadianization of the oil and gas industry.

Generally, the main distortionary features of the National Energy Policy are price controls, which keep energy prices below world market prices thereby encouraging excessive consumption of oil and natural gas, and subsidies to energy exploration, which aim to offset the disincentive effects of the price controls.

In practice, however, many marginal distortions operate under the NEP, compounding and offsetting each other in subtle ways. These

include special incentives to frontier exploration, price controls on natural gas, and so on. Removal of all distortions — ceiling prices and exploration incentives — would result in a non-distorted situation, and from a global viewpoint this might produce a greater volume of interprovincial trade.<sup>15</sup>

Whalley notes that the desirability of the NEP from the national viewpoint is unclear. Almost all academic economists condemn the NEP, but there is no argument about the potential national gain from the transfer of rents from foreign owners of energy resources. The offset comes from the domestic distortions (basically low prices) created by this program, including federal and provincial excise taxes on energy, with the net national gain or loss remaining ambiguous.<sup>16</sup>

The major federal legislative powers relating to energy policies are set out in the *Constitution Act, 1867*:

- s. 91 preamble — peace, order, and good government;
- s. 91(2) — trade and commerce;
- s. 91(3) — taxation;
- s. 92(10)(a) — interprovincial and international works and undertakings; and
- s. 92(10)(c) — the declaratory power with respect to provincial works.

In addition, the federal government's position is enhanced by the doctrine of paramountcy, by which valid federal laws prevail over conflicting provincial laws. It appears that nothing in the *Constitution Act, 1982* displaces federal powers, although, pursuant to section 92A, provincial resource jurisdiction has been enlarged to include the power to levy indirect taxes on natural resources.<sup>17</sup>

An aspect of the NEP was considered in the *Alberta Gas* case.<sup>18</sup> The majority of the Supreme Court of Canada decided in that case that an Alberta Crown corporation that exported natural gas was not subject to a federal export tax pursuant to section 125 — the Crown immunity provision of the *Constitution Act, 1867*. The majority decision did not refer to the federal powers upon which the NEP is based; however, Laskin C.J.C. in the dissenting judgment stated:

We refer to a rather obvious interpretation of the Program with social and economic conditions in all of Canada and thus as engaging the power of Parliament to legislate for the peace, order and good government of Canada. It may be that it would be sufficient in this context to embrace the trade and commerce power in that somewhat neglected dimension described in the *Parsons* case (1881), 7 App. Cas. 96, at p. 113, as "general regulation of trade affecting the whole dominion." The power to legislate for the peace, order and good government of Canada is to us a more apt repository of authority for proposed legislation of the scope and extent envisaged by the National Energy Program.<sup>19</sup>



## *The Tariff*

The tariff is a tax applied on imports, varying according to commodity and usually on a percentage of value basis. Although the same rates apply to products imported into all provinces, the tariff may affect interprovincial trade more than any other set of policies in Canada because it provides substantial protection to the domestic manufacturing industry concentrated in Central Canada. The tariff allows manufacturer provinces to sell to consumer provinces at inflated prices. What this means, in effect, is that Ontario and Quebec products are sold to the rest of Canada at higher prices than would be possible without the tariff.<sup>20</sup>

Traditional concerns about the effects of the tariff are now further exacerbated by “voluntary” restrictions on imports of automobiles and clothing. These are seen as giving a further advantage to the Ontario and Quebec manufacturing economies to the detriment of consumers in other provinces.<sup>21</sup>

Customs and excise laws were transferred from the provinces to Parliament by section 122 of the *Constitution Act, 1867*, which provided that pre-Confederation provincial customs and excise duties would continue until altered by the Parliament of Canada. That section is now spent. The federal power to enact the tariff thus rests on section 91(3), the taxation power,<sup>22</sup> or on section 91(2), the trade and commerce power. In the *Alberta Gas* case,<sup>23</sup> the majority of the Court, referring to the *Johnny Walker* case,<sup>24</sup> stated that:

Although the matter is equivocal we think the better view is that customs duties on imported goods were viewed by their Lordships as primarily supportable under Parliament’s constitutional authority to regulate trade and commerce.<sup>25</sup>

## *Federal Tax System*

There are distortionary aspects of the federal tax system. Income and corporate taxes contain provisions, aimed at certain industries or sectors, which indirectly favour particular regions. The manufacturers’ sales tax, currently imposed upon all manufactured goods consumed in Canada, has the potential to alter the terms of trade between Central Canada, where most manufacturers are located, and the rest of the country. Central Canada exports manufactured goods and imports agricultural and resources products. Western Canada does the opposite. Since the manufacturers’ sales tax changes consumption prices in each region, the substitution of locally produced goods that may occur has the potential to change the interprovincial terms of trade to Central Canada’s disadvantage, thereby offsetting the interprovincial trade effects of the federal tariff.<sup>26</sup>

The federal power to tax derives from section 91(3) of the *Constitution Act, 1867*. It embraces all forms of taxation and, according to Hogg, it does not appear to be limited in any important way, other than by the ordinary principles of classification and colourability which apply to all legislative powers.<sup>27</sup>

In theory, the provincial power to tax directly for provincial purposes should impose some constraints upon the federal taxing power.<sup>28</sup> Nonetheless, the federal Parliament may levy direct taxation, such as income tax.<sup>29</sup> Under provisions in the *Constitution Act, 1867* and under federal-provincial agreements a substantial amount of federal revenue is transferred to the provinces. Since federal revenues from indirect and direct taxes are consolidated in one fund, Hogg says, it is clear that the federal Parliament does levy direct taxes for provincial purposes.<sup>30</sup>

### ***Freight Rates***

Freight subsidies are one of the most obvious examples of federal subsidies in general. The major freight subsidization scheme has been the Crowsnest Pass Agreement, entered into by the federal government and the Canadian Pacific Railway in 1897. In exchange for a sum of money to pay for tunnel construction, the railway agreed to charge below-cost freight rates on shipping certain products from the Prairies to points east. The subsidization of freight rates for the movement of statutory grains has meant that Prairie farmers have received a greater return per acre for growing those grains than otherwise would have been the case. The rate has been seen as benefiting the Prairie provinces at the expense of other provinces who pay the taxes.<sup>31</sup> Less grain has been produced in other parts of Canada because Prairie producers have had this advantage. And non-subsidization of processed products has discouraged processing so that livestock and food processing sectors in the West have not developed as they might have.<sup>32</sup>

The *Western Grain Transportation Act*,<sup>33</sup> enacted in 1983, abolished the Crow Rate and gave the Canadian National and the Canadian Pacific Railways permission to charge more for moving grain so that they could eliminate losses incurred under the former rate. In return for receiving an annual subsidy from the federal government, the railways are now committed to guarantee deliveries and to expand the western transportation system.<sup>34</sup> However, since the rate will be a combination of full and subsidized costs, acreage will still be devoted to crops covered by the statutory rates. This means that there will continue to be a disincentive to the establishment of agribusiness and diversification.<sup>35</sup>

Freight rates in eastern and Atlantic Canada have also been subsidized by means of the *Maritime Freight Rates Act*,<sup>36</sup> the *Atlantic Region Freight Assistance Act*,<sup>37</sup> and feed freight assistance.<sup>38</sup> In recent years there has been a progressive reduction of these subsidies. Transportation



rates for other commodities are also subsidized. For example, pipeline transportation of refined petroleum products is subsidized from Montreal to the Maritimes.<sup>39</sup>

The federal power to regulate freight rates and pipeline transmission rates stems from the *Constitution Act, 1867*, section 92(10)(a), which gives Parliament power to make laws in relation to local works and undertakings that connect a province with any other province. This section is read with section 91(29), which gives the federal Parliament powers over those classes of subjects expressly excepted in the list of items assigned exclusively to the provinces. The effect of these sections is that the federal government is allocated power over interprovincial and international undertakings, while the provinces have authority over intraprovincial undertakings. Federal jurisdiction extends over a provincial line on the grounds of interconnection or where the line is declared to be for the general advantage of Canada.<sup>40</sup>

Both the Canadian National and the Canadian Pacific Railways have been declared “works or undertakings for the general advantage of Canada.”<sup>41</sup> It has been held that once a work is so declared, regulatory jurisdiction is established.<sup>42</sup> Whether a particular work is actually for the general advantage of Canada is seen as an issue of policy for Parliament and, as such, not subject to judicial review.<sup>43</sup>

An interprovincial pipeline company has been held to be an undertaking subject to federal jurisdiction; the federal jurisdiction to regulate includes the power to regulate tolls, and it extends to all services provided by the undertaking, including those that are provided entirely within the province.<sup>44</sup>

## Summary

In summary, federal policy measures respecting energy, the tariff, the federal tax system, and freight rates have the effect of distorting the free flow of goods. However, as the examples show, the “winners” and “losers” from federal distortions are not always the same. Residents of almost all areas have been beneficiaries of one or another set of policies; for example, Central Canadian manufacturers benefit from the protection of the tariff, while Prairie grain growers and Maritimers benefit from subsidized freight rates.

Constitutionally, Parliament appears to be unconstrained in the exercise of its legislative powers in these areas. Federal energy policies are enabled by various federal powers; where provincial natural resource policies conflict with federal policies, the doctrine of paramountcy would uphold the latter. The tariff is an exercise of the federal trade and commerce power. The federal manufacturers’ sales tax is an exercise of the federal taxation power. Federal commodity transportation rates are enacted pursuant to section 92(10)(a) as read with section 91(29). Given

that these powers are unconstrained, would it be desirable to limit them in these policy areas? We address this question below in the part dealing with justifications for barriers.

## **Governments in Agreement: Federal-Provincial Barriers**

The federal and provincial governments sometimes act as partners rather than as adversaries in creating impediments to interprovincial trade. This can be seen to be the case with respect to trucking regulations and marketing boards.

### ***Trucking Regulations***

The barriers to interprovincial movement of goods created by trucking regulations are not so much a problem of discrimination as they are one of harmonization of rules. Generally, there are six areas in which barriers arise: economic regulation, such as control of the rates that may be charged; registration requirements; weight and dimension regulations; safety restrictions; different enforcement practices; and fuel and sales taxes.<sup>45</sup>

Interprovincial trucking is regulated by the provinces through federal interdelegation of authority. As mentioned in the context of federal freight rates, pursuant to section 92(10) read with section 91(29), Parliament has jurisdiction over interprovincial and international transportation; this jurisdiction includes the interprovincial transportation of goods by motor vehicle.<sup>46</sup> Once continuous and regular transportation across a provincial boundary is established, the whole work or undertaking, including its intraprovincial aspects, will be subject to federal regulation under section 92(10)(a). Federal jurisdiction thus includes both the local and long-distance elements of a business if they form a single interprovincial undertaking.<sup>47</sup>

Provincial jurisdiction over solely intraprovincial motor vehicle transportation derives from authority over local works and undertakings, property and civil rights, and matters of a local nature. Provincial authority may extend to the regulation of provincial highways, for example, with respect to the weight of vehicles, but a provincial government cannot impose licensing requirements on interprovincial carriers so as to prohibit their making use of those highways.<sup>48</sup> Provincial laws will be inoperative where they interfere with the exercise of a federal undertaking.

To avoid regulatory duplication, the federal government has delegated its authority to the provinces. In the 1954 *Winner* case,<sup>49</sup> the Privy Council held that New Brunswick legislation that protected local transportation companies from competition was unconstitutional. Because the U.S.–Nova Scotia bus line in question was a single undertaking of a connecting nature, the Court held that it was within federal jurisdiction



and thus not subject to the New Brunswick law. As the provinces had had regulatory authority over trucking before *Winner*, the federal government had to assume jurisdiction over this area without the required administrative structure.

Consequently, in 1953 the *Motor Vehicle Transport Act*<sup>50</sup> was passed, which provided that extraprovincial carriers operating in a province had to obtain a licence from the provincial transport board. According to section 3(2) of the Act, the provincial transport board was to license extra-provincial carriers "upon the like terms and conditions and in the like manner as if the extra-provincial undertaking operated in the province were a local undertaking." In this way, says Hogg, the federal government not only delegated unwanted regulatory power back to the provincial transport boards but directed them to apply provincial laws in existence from time to time.<sup>51</sup> This was administrative interdelegation coupled with an anticipatory incorporation by reference and was held to be constitutionally valid in *Coughlin v. Ontario Highway Transport Board*.<sup>52</sup>

Are there limits to this interdelegation? In *R. v. Smith*<sup>53</sup> the Alberta Transport Board imposed on extraprovincial carriers a restriction regarding the transportation of shrubs and trees not imposed upon intraprovincial carriers. The Supreme Court of Canada held that the Act authorized a provincial board to adopt a practice with respect to extra-provincial licensing which differed from that of local licensing. Hogg disagrees with this decision because it allows a federal act to validate a provincial law which would be invalid otherwise and which has no provincial significance since it deals solely with a federal matter.<sup>54</sup>

Parliament may at any time withdraw its delegated authority over interprovincial trucking under Part III of the *National Transportation Act*;<sup>55</sup> the undertaking would then be under the authority of the Canadian Transport Commission. Although Part III has been proclaimed, it has not been implemented as the federal government attempts to negotiate the reform of the regulations with the provinces.<sup>56</sup>

## ***Marketing Boards***

A marketing board may be defined as "a compulsory horizontal marketing organization for primary and processed natural products operating under government delegated authority."<sup>57</sup> In Canada there are over 100 marketing boards that can be ranked hierarchically according to the marketing powers they exercise. In ascending order of market control these are: promotional and development boards; single-selling-desk agency boards; negotiating boards; price setting boards; and supply management boards.<sup>58</sup>

Supply management marketing boards, in particular, can be perceived as barriers to the flow of interprovincial trade: restrictions on output

create inefficiencies in the allocation of resources generally, and producer quotas affect the size of farms so that economies of scale may not be attained. Supply management boards were formed pursuant to the *Farm Products Marketing Agencies Act*.<sup>59</sup> Products come under the scheme if there is substantial agreement among producers and the minister acts upon this. Once a product is within the scope of the legislation, the federal agency may delegate authority to a provincial body. The federal agency allocates quotas to the provincial body, which sets out specific individual producer quotas. At present, nationally regulated products include wheat, eggs, chickens, turkeys, and industrial milk.<sup>60</sup>

The legal history of marketing boards is a good illustration of the difficulties that may arise from the division of federal and provincial powers in economic matters. Given that the federal power to regulate trade and commerce, under section 91(2), has been interpreted to apply to interprovincial and international transactions<sup>61</sup> and that the provincial power over property and civil rights, under section 91(13), applies to intraprovincial economic matters, marketing board cases have raised the question: where does the regulation of intraprovincial trade stop and that of interprovincial and export trade begin?<sup>62</sup> Although section 95 of the *Constitution Act, 1867* provides that the provinces may make laws in relation to agriculture and immigration concurrently with the federal Parliament, this section has been held inapplicable to the marketing of agricultural products.<sup>63</sup>

British Columbia enacted the first marketing legislation in 1927. The *Produce Marketing Act*<sup>64</sup> established a "Committee of Direction" that had the power to regulate all aspects of the marketing of tree fruits, including pricing, collection of a levy and administration of an equalization fund. In 1931 this legislation was declared ultra vires by the Supreme Court of Canada on the grounds that it regulated interprovincial trade and that the levy constituted an indirect tax.<sup>65</sup>

Pressured to enact similar legislation, Parliament passed the *Natural Products Marketing Act, 1934*,<sup>66</sup> which allowed the federal government either to exercise marketing powers directly or to delegate them to local producer boards. In 1937 the Privy Council declared this legislation ultra vires as in relation to matters of a local nature and thus an infringement of provincial powers.<sup>67</sup> However, Lord Atkin offered a solution to the problem of divided jurisdiction:<sup>68</sup>

It was said that as the Provinces and the Dominion between them possess a totality of complete legislative authority, it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in cooperation with the other achieve the complete power of regulation which is desired. Their Lordships appreciate the importance of the desired aim. Unless and until a change is made in the respective legislative functions of Dominion and Province it may well be that satisfactory results for both



can only be obtained by cooperation. But the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other.

In other words, the Privy Council suggested that the two levels of government could cooperatively enact a regulatory scheme for the marketing of agricultural products.

In 1949 the federal *Agricultural Products Marketing Act*<sup>69</sup> was enacted allowing provincial boards to exercise control over both intra- and interprovincial trade. The problem of split jurisdiction was taken care of by each level of government delegating the appropriate powers to the marketing board — which could then control intraprovincial and interprovincial trade as delegated. This exercise of interdelegation was upheld in *P.E.I. Potato Marketing Board v. Willis*<sup>70</sup> (a case in which the board had powers with respect to the extraprovincial trade in potatoes), and confirmed in *Coughlin v. Ontario Highway Transport Board*<sup>71</sup> wherein Cartwright J. held:

It is well settled that Parliament may confer upon a provincially constituted board power to regulate a matter within the exclusive jurisdiction of Parliament. . . . In my opinion there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body as it may from time to time exist. . . .<sup>72</sup>

In practical terms, it is important to have both federal and provincial legislation because it is difficult to know whether agricultural products will end up in a local or an interprovincial market.<sup>73</sup> In 1957 in *Reference re The Farm Products Marketing Act*,<sup>74</sup> the Supreme Court of Canada upheld Ontario marketing legislation on the grounds that it did not aim at the regulation of interprovincial trade but rather was directed to local trade. However, in his judgment, Kerwin C.J. suggested a functional approach towards interpreting the division of powers with respect to marketing:

However, if the hog be sold to a packing plant or the vegetables or peaches to a cannery, the product of those establishments in the course of trade may be dealt with by the Legislature or by Parliament depending, on the one hand, upon whether all the products are sold or intended for sale within the Province or, on the other, whether some of them are sold or intended for sale beyond Provincial limits. It is, I think, impossible to fix any minimum proportion of such last-mentioned sales or intended sales as determining the jurisdiction of Parliament. This applies to the sale by the original owner. Once a statute aims at “regulation of trade in matters of inter-provincial concern” . . . it is beyond the competence of a Provincial Legislature.<sup>75</sup>

Thus, Kerwin C.J. recognized that such legislation could have both provincial and federal aspects which required that the Court attempt to balance respective interests.<sup>76</sup>

Applying the same approach in the *Carnation* case,<sup>77</sup> the Supreme

Court of Canada held that Quebec marketing legislation was not invalid because it merely affected the price of milk extraprovincially. Martland J. in his judgment written for the unanimous Court summarized:

I agree with the view of Abbott J., in the *Ontario Reference*, that each transaction and each regulation must be examined in relation to its own facts. In the present case, the orders under question were not, in my opinion, directed at the regulation of interprovincial trade. They did not purport directly to control or to restrict such trade. There was no evidence that, in fact, they did control or restrict it. The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.<sup>78</sup>

Until the early 1970s this system worked quite well. Then certain provincial marketing boards for chickens and for eggs decided to take a competitive rather than cooperative approach toward each other. In the *Manitoba Egg Case*<sup>79</sup> the Manitoba marketing scheme was declared invalid. Martland J. held:

It is my opinion that the Plan now in issue not only affects inter-provincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.<sup>80</sup>

Consequently, the *Farm Products Marketing Agencies Act*<sup>81</sup> was passed in 1972. The important feature of the “national” agencies created under the Act is an explicit agreement between the various provincial marketing boards to share the national market in a cooperative manner. The presence of such a national supply management scheme also allows the federal government to control imports on the specified commodities, thus protecting the national boards from international competition. As a member of the GATT, Canada is committed not to implement import quotas for commodities that are not subject to regulation of supplies at the national level.

This legislation has been upheld by the Supreme Court of Canada in *Reference re Agricultural Products Marketing Act and Two Other Acts*, wherein Pigeon J. writing for the majority stated:

The Board is properly empowered by provincial authority to regulate the intraprovincial trade and it has delegated authority from the federal in respect of the extraprovincial trade. I fail to see what objection there can be to overall quotas established by a board thus vested with dual authority, unless it is said that our constitution precludes any businesslike marketing of products in both local and extraprovincial trade except under a federal assumption of power, something which I think is directly contrary to the basic principle of the *B.N.A. Act*.<sup>82</sup>



In brief, the development of constitutional law with respect to agricultural marketing boards shows how difficult it is to balance provincial interests against federal interests. At present, both levels of government, in cooperation, have delegated powers to marketing boards in order to address this legal difficulty. While we have focussed on the interpretations of section 91(2) and sections 92(13)/(16), marketing board legislation has also been challenged under section 121. In the next part of this paper, we discuss the application of section 121 to this legislation.

## ***Summary***

Our discussions of trucking and agricultural marketing boards have shown that when governments find it necessary to do so, they can jointly restrict the free flow of goods through the constitutionally valid process of delegation. The only legal constraint upon the exercise of these powers is through administrative law that requires the rules of natural justice to be upheld with respect to delegation.<sup>83</sup>

## **The Imperfect Economic Union: Provincial Barriers**

During the 1980–81 discussions on the Constitution, one federal objective was to reduce the ability of a province to impose barriers that discriminated against other provinces. This, the government argued, required an enhancement of either section 121 or section 91(2). Jean Chrétien submitted that:

The freest possible access to the national market should be inherent to Canadian citizenship, and therefore secured in the Constitution. Any provincial authority should bear in mind that whenever it discriminates against the residents of other provinces, it exposes its own residents to retaliatory discrimination by the governments of these other provinces. . . .<sup>84</sup>

## ***Section 121 and the Customs Union***

A customs union is defined as an economic arrangement in which there are no tariffs on goods traded among members, but there is a common external tariff imposed upon goods from non-members.

## **PROHIBITION OF TARIFFS AMONG PROVINCES**

Again, section 121 is the provision that states:

All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

This section has been used infrequently to challenge legislation. Generally it has been interpreted as forbidding provincial and federal customs duties on goods moving interprovincially.

In *Gold Seal Ltd. v. A.-G. Alberta*,<sup>85</sup> it was argued that section 121 was violated by the *Canada Temperance Act*, which prohibited the importation of intoxicating liquor into provinces where its sale was forbidden by provincial law. In upholding the law, under the federal general power “to make laws for the peace, order, and good government of Canada,” the Supreme Court of Canada stated that the real purpose of section 121 was to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province.

Nevertheless, once goods enter a province, section 121 does not prevent the province from regulating them. In *Atlantic Smoke Shops Ltd. v. Conlon*,<sup>86</sup> a provincial tax, equivalent to the local sales tax and imposed on tobacco imported into New Brunswick, was upheld as a valid exercise of direct taxation by the province. The Privy Council held that section 121 was not violated because the tax was paid directly by the consumer and was not imposed as a condition of entry.

In *Murphy v. C.P.R.*<sup>87</sup> the *Canadian Wheat Board Act* was challenged. This Act set up a comprehensive scheme for the marketing of grain, whereby no person other than the Board could ship grain. In this case, the railway company had refused delivery of the plaintiff’s grain from Manitoba to British Columbia because he had attempted to do so outside the terms of the Act. The Supreme Court of Canada held that the legislation was valid pursuant to the federal trade and commerce power and that section 121 had not been violated. However, the judgment of Rand J. seems to point to a wider interpretation of section 121:

I take section 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.<sup>88</sup>

In *Reference Re Agricultural Products Marketing Act*, this interpretation was accepted by four out of nine judges, and not addressed by the remaining five.<sup>89</sup> In that case Laskin C.J.C., in his dissenting judgment, was of the opinion that section 121 may apply differently according to whether provincial or federal legislation is in issue:

[W]hat may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. It must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other Provinces. . . .

Accepting [Rand’s] view of s. 121, I find nothing in the marketing scheme here that, as a trade regulation, is *in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing



statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any Province.<sup>90</sup>

Given these cases, it is clear that section 121 prohibits customs duties affecting interprovincial trade in provincial products. Mr. Justice Rand's judgment would seem to extend section 121 beyond customs duties, as does Laskin C.J.C.'s "punitive regulation directed against or in favour of any Province." Therefore, the question is open as to whether section 121 could be interpreted as prohibiting non-tariff barriers.<sup>91</sup>

## COMMON TARIFF ON IMPORTS

The second element of a customs union is a common tariff on imports. The external tariff in Canada is a matter of exclusive federal jurisdiction as explained above.<sup>92</sup>

## TAXES EQUIVALENT TO CUSTOMS DUTIES

Although it is clear that the federal government has jurisdiction over import taxes, Bernier points out that provincial monopolies on the sale of alcohol discriminate against non-local producers in the form of differential markups based on origin. This has been described as a "disguised customs duty."<sup>93</sup> Bernier notes that under the GATT, the markups of monopolies are treated as customs duties. Once provinces act within the role of state enterprise, they seem to be able to do indirectly what they cannot do directly by legislation or regulation.<sup>94</sup>

Customs duties include import and export taxes.<sup>95</sup> In the past, provinces have tried unsuccessfully to impose export taxes. In *A.-G. B.-C. v. McDonald Murphy Lumber Co.*,<sup>96</sup> it was held that a provincial tax on cut timber was equivalent to an export tax and thus an infringement of section 122, as well as an exercise of indirect taxation and thus contrary to section 91(3). In *Texada Mines Ltd. v. A.-G. B.-C.*<sup>97</sup> the Court held that a provincial tax on minerals was unconstitutional because it was intended to be an export tax and not a tax to raise revenue for provincial purposes.

More recently, the Supreme Court of Canada held in *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*<sup>98</sup> that a Saskatchewan mineral income tax and royalty surcharge constituted what was essentially an export tax on oil production; it was thus ultra vires the provincial legislature as an intrusion upon the federal trade and commerce power.

However, section 92A(4) of the *Constitution Act, 1982* now permits the provinces

[to] make laws in relation to the raising of money by any mode or system of

taxation in respect of . . . [natural] resources . . . whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

This means that the provinces now have the power to impose export taxes on natural resources as long as they do not impose taxes which discriminate against other provinces.<sup>99</sup>

## SUMMARY

The cases show that section 91(3) has been used more frequently than section 121 to protect the customs union. While the courts have been called upon infrequently to decide upon tariff barriers, there is the powerful language of Rand J. and Laskin C.J.C. suggesting that when called upon to do so, the Supreme Court of Canada will address both federal and provincial barriers to the free flow of goods, whether these are in the form of customs duties or non-tariff barriers.

We turn now to a consideration of the imposition of non-tariff barriers by provinces, discussing the legal justification for their creation and the constitutional means by which individuals and governments may challenge them.

### *Provincial Non-Tariff Barriers*

It is useful to look at some of the major provincial non-tariff barriers in terms of the roles played by provincial governments in imposing these policies. In this way we may be able to determine which barriers are the result of “beggar thy neighbour” protectionism and which barriers are the result of legitimate government objectives. Can one argue that a retaliatory policy on the part of one province is legitimate if it is meant to counterbalance the protectionist policy of another?

## GOVERNMENT AS BUYER: PROCUREMENT POLICIES

Most provincial governments have purchasing policies that favour local goods and services. The federal Department of Supply and Services also has an internal policy stating that goods and services should be purchased as close as possible to the ultimate point of consumption. A preferential purchasing policy may be implicit or explicit; a matter of policy or a matter of law.<sup>100</sup>

The usual methods of preferential procurement are:

- selective or single tender instead of public tender;
- inadequate publicity or information on bidding (local source lists);
- short time limits for submission of bids;



- requirements tailored to what local businesses can provide;
- residence requirements for vendors; and
- preferential margins for local or Canadian suppliers.<sup>101</sup>

The extent of these policies may reach far beyond actual provincial or federal government purchases to those made by hydro companies, municipal public transit, school systems, railways, airlines, telephone companies, and resource industries in which there is provincial involvement.

Like subsidies, government procurement in international economic theory is considered a trade distortion; one could say that it is a form of customs import duty. The level of the subsidy, or protection afforded local products, is determined by the difference between the lower out-of-province price and the local price.<sup>102</sup> Provincial preferential purchasing is an exercise of contracting powers that are legally analagous to spending powers. The practice seems to be treated in the same way as subsidies — that is, a government is free to contract as it wishes. No Canadian case has yet been decided directly on this point.<sup>103</sup>

There are, however, indications that organizations will challenge a provincial procurement policy, given an appropriate case, under section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*. This provision reads:

6.(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

. . . . .

(b) to pursue the gaining of a livelihood in any province.

Binavince argues that this section includes protection of the free movement of goods because they are utilized by a person “to pursue the gaining of a livelihood in any province.”<sup>104</sup> In our view, this argument is tenuous given the nature and outcome of the constitutional discussions. All discussions on the mobility of goods took place under the topic of “Powers over the Economy”; the federal proposals for constitutional change, namely expansion of section 121 and section 91(2), were not accepted by the provinces. In light of the Court’s increasing acceptance of evidence that shows the Parliamentary history of legislation as an aid to its interpretation,<sup>105</sup> we think that the Court would consider the relevant background material to the Charter and decide that section 6(2) applies only to persons and not to the free movement of goods.<sup>106</sup> This provision is more likely a legal challenge to procurement of services rather than goods.

Many preferential purchasing policies are implicit and an exercise of administrative discretion. Constitutionally, it is easier to challenge an explicit and legislated procurement policy, such as that of Quebec.<sup>107</sup> As we have argued above, it is open to the courts to interpret section 121 as a prohibition on non-tariff barriers to the free movement of goods, including procurement policies.

## GOVERNMENT AS ECONOMIC DEVELOPER: SUBSIDIES

Provincial industrial strategies often include subsidies and incentives that can adversely affect out-of-province producers.<sup>108</sup> Types of incentives to direct investment have included: loans; tax holidays; guarantees for corporate borrowing in the private sector; direct equity participation by the provincial government; provision of infrastructure at public expense; and favourable terms for exploitation of Crown timber and other natural resources.<sup>109</sup> Also common are agricultural support programs: direct aid to farmers and support in the promotion of local produce.<sup>110</sup>

Often provincial financial assistance programs are complementary to federal government programs, aid being denied where an applicant qualifies for federal funds.<sup>111</sup> Provinces are empowered to subsidize local industries by virtue of the provincial spending power. This derives from section 92(2), which allows provinces to impose direct taxes within the limits of their territories “for provincial objects.” However, it has been held that the words “for provincial objects” mean simply “for the exclusive disposition of the legislature.”<sup>112</sup> In one of its first judgments, the Supreme Court of Canada upheld, on the basis of section 92(2), a New Brunswick law authorizing a municipality to impose a tax to subsidize the construction of an extraprovincial railway.<sup>113</sup> Provinces often use their spending power for extraterritorial purposes, for example, to establish trade missions.

La Forest concludes:

There seems no constitutional impediment, either, to prevent the provinces from encouraging, by grants, schemes falling largely within federal regulatory control in the absence of inconsistent federal legislation. Moreover, subject to overriding federal legislation, the provinces may affect the scope and direction of such schemes by making these grants subject to conditions.<sup>114</sup>

In international economic law, the classic way to counteract another country's export subsidy is to impose supplementary duties that compensate for the estimated amount of the subsidy. In Canadian constitutional law, provinces cannot do this because they are prohibited from imposing customs duties. Provincial subsidies that skew competition among provinces might be considered unconstitutional in the same manner; but, as with procurement, the courts have not had the occasion to deal with this issue.<sup>115</sup> One might also question whether the courts would consider a law or regulation that was tied to a subsidy for exports a matter of interprovincial or international trade and commerce.<sup>116</sup>

## GOVERNMENT AS REGULATOR: STANDARDS

Differences in provincial regulation of product standards may create barriers to interprovincial trade. A recent case illustrates a barrier with



respect to packaging. In August 1983, Quebec Agriculture officials gave Ontario tomato producers and shippers two days' notice that the widely used four-litre baskets would no longer be acceptable in Quebec. Farmers in southwestern Ontario were particularly disadvantaged by this change in packaging. Nine provinces, including Quebec, had agreed in 1982 to ship numerous fruits, tomatoes and potatoes in metric containers. After Quebec abrogated the agreement, Ottawa passed legislation legalizing the use of four-litre baskets, but Quebec, as of June 1984, had not amended its regulations. The federal government can protect the right of Ontario growers to ship produce to Quebec in metric containers; but once the produce is within Quebec, provincial standards apply.<sup>117</sup>

Regulation of product standards may also have an effect on international trade. Having signed the GATT Agreement on Technical Barriers to Trade in 1979, Canada is committed to ensuring that domestic product standards are not used to discriminate against goods from other countries. Since the federal Parliament cannot bind the provinces to implement international treaties that touch on matters within provincial jurisdiction,<sup>118</sup> provincial product standards considered by Canada's trading partners to be arbitrarily or unjustifiably discriminatory could eventually result in those countries setting up retaliatory measures against Canadian goods.<sup>119</sup>

The provincial power to legislate product standards derives from section 92(13) "property and civil rights in the province" and section 92(16) "matters of a merely local or private nature." Standards can be set for products sold within the province providing they do not infringe upon the federal power to regulate interprovincial or international trade and commerce, or upon the federal criminal power.<sup>120</sup>

The federal powers over product standards are illustrated in this passage from Chief Justice Laskin's majority judgment in the *Kripps Pharmacy* case:

There appear to be three categories of provisions in the *Food and Drugs Act*. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Part III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.<sup>121</sup>

Even where there is a significant federal interest, provincial standards have been upheld. In *McNeil v. Nova Scotia Board of Censors*,<sup>122</sup> provincial film censorship was held to be regulation of local business and not an unconstitutional exercise of the federal criminal power. In *A.-G. Que. v. Kellogg's Co. of Canada*,<sup>123</sup> a Quebec regulation prohibiting the use of cartoons in children's advertising was upheld as a regulation of business within the province, even though the Supreme Court of Canada has held

that content regulation over television broadcasting is a matter under federal jurisdiction.<sup>124</sup>

In two recent cases federal attempts to legislate standards have been struck down because the legislation could not be supported under the federal trade and commerce power.<sup>125</sup> In *Labatt Breweries v. A.-G. Canada*<sup>126</sup> the federal Food and Drugs Act Regulations that set standards for the production and labelling of “beer” and “light beer” were declared unconstitutional because, Justice Estey reasoned:

Nowhere are the impugned statutory regulations or provisions concerned with the control or regulation of the extraprovincial distribution of these products or their movement through any channels of trade. On the contrary, their main purpose is the regulation of the brewing process itself by means of a “legal recipe”, as counsel for the appellant put it. Indeed, if the industry is substantially local in character, as seems to be the case from the sparse record before the court (as noted above), the regulations are, in fact, confined to the regulation of a trade within a province.<sup>127</sup>

The regulations were not supportable — neither under the federal criminal power nor under the “Peace, Order, and Good Government” power. It is worth noting that the court’s interpretation of the trade and commerce clause as it applies to federal standards in *Labatt* would seem directly to contradict its interpretation in *Kripps Pharmacy*, as quoted above.<sup>128</sup>

In *R. v. Dominion Stores*,<sup>129</sup> a federal system for grading apples which was applicable locally only on a voluntary basis, but which was compulsory in interprovincial and international trade, was held to be inapplicable to local transactions within the province.

With respect to provincial product standards interfering with Canada’s obligations under the GATT, it is possible that, just as for liquor policies having the same effect, these barriers could be challenged as infringing upon the federal trade and commerce power to regulate international trade.<sup>130</sup>

## GOVERNMENT AS OWNER-CONSERVER-MANAGER: NATURAL RESOURCE POLICIES

There are several types of natural resource policies affecting interprovincial trade:

- taxes and royalties on resource income;
- additional duties on resources if they are shipped out of the province in an unprocessed form; and
- terms and conditions in provincial government leases of resources which may restrict entry to local residents or impose obligations with respect to processing of resources.

For example, all provinces except P.E.I. impose a mining tax; where



policies differ, there may be incentives for companies to go to the least taxed province. However, any comparison of tax rates could be misleading because there are also differences in what income is exempted from tax calculations. Another example of how a natural resource policy may be distortionary is that of a province's permitting a firm to deduct a percentage of the cost of processing or manufacturing assets from the income subject to the mining tax. There may also be a deduction of exploration costs from mining income provided that expenditures occur within the province.<sup>131</sup>

Under the *Constitution Act, 1867*, the following sections empower provincial governments as owners to influence the free movement of natural resource products:

- s. 92(2) — direct taxation within the province in order to raise revenue for provincial purposes
- s. 92(5) — management and sale of public lands of the province
- s. 92(13) — property and civil rights in the province
- s. 92(16) — local matters
- s. 109 — preserves provincial ownership of all lands, mines, minerals and royalties belonging to the provinces at the time of Confederation
- s. 117 — reserves to provinces all respective public property not otherwise disposed of in the Act
- s. 125 — non-taxation of Crown lands
- s. 92A — exploration, development, conservation and management of non-renewable natural resources in the provinces

As owners, provinces can control production, processing and sale of resources through proprietary and contractual arrangements. In this way they may legislate to impede the mobility of natural resources. In *Smylie v. R.*,<sup>132</sup> provincial legislation imposing a condition in timber leases that logs for export be processed in Canada was upheld under section 92(5). The Ontario Court of Appeal stated that the province had the same proprietary and contractual rights respecting Crown land as any owner.

*Smylie* was confirmed by the Privy Council in *Brooks-Bidlake and Whittall Ltd. v. A.-G. B.C.*<sup>133</sup> In that case a provincial act, validating a term in licences to cut timber on Crown lands which stipulated that no Chinese or Japanese labour was to be hired, was held *intra vires* under section 92(5). The law was held not to conflict with Parliament's exclusive jurisdiction over "naturalization and aliens" under section 91(25). However in *A.-G. B.C. v. A.-G. Canada*,<sup>134</sup> the Privy Council held that an act like the one in *Brooks-Bidlake* probably could not go beyond providing conditions of licence renewals. Referring to these cases, Chief Justice Laskin in his dissenting judgment in the *Alberta Gas* case summarized the law as follows:

We have, as well, no reason to doubt that the province may engage in extra-provincial transactions as a proprietor (in respect of its natural resources) so long as there is no inhibiting or regulating federal legislation. In short, it may do as a proprietor (absent federal legislation) what it might not be able to do as a legislator.<sup>135</sup>

In two recent cases the Supreme Court of Canada held that despite provincial ownership, provincial legislation cannot be directed towards regulating the export market price. In *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*<sup>136</sup> the legislation under attack created a “royalty surcharge” designed to give the government automatically the entire proceeds of any increase in the value of crude oil. The Court held that this was not a royalty but an indirect tax, since the producer upon whom it was levied was meant to pass it on to the ultimate consumer.

In *Central Canada Potash v. Government of Saskatchewan*,<sup>137</sup> although Saskatchewan claimed that the legislated rationing and price fixing were conservation and management measures, the Court held that the pith and substance of the legislation was to fix the price at which the product would be sold out of the province. It was thus an intrusion upon federal jurisdiction. The Court did not discuss the case where the resource was owned by the province. After these cases it is unclear whether similar legislation would be struck down as regulation of interprovincial or international trade.

What is the effect of section 92A upon provincial proprietary rights over natural resources, especially the effect of the new provincial power to tax resources indirectly? As mentioned above, the provinces are now permitted to impose export taxes on natural resource products as long as they do not discriminate against provinces within the domestic market. Given this expanded jurisdiction, the provinces will have less reason to rely upon the theory of provincial proprietary rights — unless the courts interpret section 92A narrowly.<sup>138</sup>

As stated by Laskin C.J.C. in the above passage, a province exercising its ownership powers could always be overridden by a valid federal law that limited the province in the terms it imposed in its leases. Parliament could legislate by means of section 91(2) respecting international or interprovincial trade in resources so as to limit the province’s contractual freedom. This limitation would have to be incidental, or ancillary, to a legitimate trade regulatory scheme. Likewise the federal “peace, order, and good government” power could support legislation enacted to meet emergency situations or matters of national concern.<sup>139</sup>

## GOVERNMENT AS MONOPOLY ENTERPRISE: PROVINCIAL LIQUOR POLICIES

All provinces have a public monopoly in the sale of liquor. Generally there are three types of liquor policies that create barriers to interprovin-



cial trade. The first is discrimination against out-of-province producers by giving support to local products, usually wine. This can be done by better promotional support; advantageous positioning in liquor outlets; less stringent listing requirements; and preferential pricing policies. The second type of policy is to limit private purchases from other provinces through a quota system or by levying taxes on the purchases. And third, a province may have unique packaging requirements that make it too costly for out-of-province products to enter the market.<sup>140</sup>

A provincial government monopoly over liquor sales may discriminate against out-of-province products without the appearance of outright discrimination. Prices of imported alcohol may actually reflect higher administration costs. However, additional costs can also come close to being customs duties that are the exclusive domain of the federal government as discussed above.<sup>141</sup>

The power to create a provincial public monopoly over the sale of certain goods was affirmed in *Canadian Indemnity Co. v. A.-G. B.C.*<sup>142</sup> In that case B.C. legislation establishing a provincial monopoly over auto insurance was upheld. The Supreme Court of Canada recognized that the impact of the legislation upon the appellants' automobile insurance business in British Columbia could not be more drastic. Nonetheless, it decided that the effect of the legislation upon companies whose operations are interprovincial in scope does not mean that the legislation is in relation to interprovincial trade and commerce. The aim of the legislation related to a matter of local concern within the province and to property and civil rights within the province.

In *Régie des alcools du Québec v. Pilote*<sup>143</sup> it was held that the regulation of the transport of alcohol within the province should be considered — in the framework of provincial monopoly over alcohol — as an exercise of power ancillary to the power over local commerce, even if indirectly it results in a restriction on the right to import.

It would appear that the federal government condones the creation of this particular trade barrier. To protect provincial liquor monopolies, Parliament enacted the *Importation of Intoxicating Liquors Act*.<sup>144</sup> This Act prohibits, save as otherwise provided, the importation of liquor into provinces where there are provincial monopolies on the sale of liquor.

Although the courts have yet to decide the point, provincial liquor policies that discriminate unnecessarily against imports could possibly be challenged as an infringement upon the federal power to tax imports, as mentioned above. It is also arguable that such pricing is unconstitutional as being in violation of Canada's obligations under the GATT and thus an infringement upon the federal power over international trade and commerce.<sup>145</sup>

## SUMMARY

There are at the present time few constitutional constraints upon the

powers of provincial governments to impede the movement of goods in the ways just described. The two major constraints are section 121 and section 91(2).

When governments, both provincial and federal, act in their capacity as buyers, they exercise their power to contract. This power is virtually unrestricted. However, it is possible that an explicit procurement policy could be challenged under either section 121 or section 91(2). The success of a section 121 challenge would depend upon the court's willingness to expand this section to include a prohibition on non-tariff barriers — an interpretation which has been suggested in obiter dicta by Justices Rand and Laskin. Section 91(2) would be a stronger challenge if the specific object of the legislation were to discriminate interprovincially or internationally. It seems unlikely that section 6, the mobility rights clause of the *Canadian Charter of Rights and Freedoms* would prohibit procurement.

When provincial governments act as economic developers by granting subsidies to businesses, they exercise spending powers which flow from section 92(2), the power to tax directly for provincial purposes. This power also appears to be unconstrained. However, one could argue that when a province subsidizes an export trade, it infringes upon the federal power to regulate international trade and commerce.

Provincial governments as regulators can set different product standards under section 92(13) and section 92(16). To date, provincial standards with respect to censorship have withstood an attack that they intruded upon the federal criminal power. Provincial television advertising standards have been upheld against an attack that they intruded upon the federal power over broadcasting. The courts have also protected the provincial power to legislate standards by striking down federal standards over the composition of beer and over the grading of apples.

When provincial governments act as owners, conservers, or managers of natural resources they exercise a number of powers, the most relevant of which is section 92A. Until now, the limits on these powers have been, and continue to be, limits on the taxing powers of the provinces. Although section 92A now expands those powers, there is the constraint under section 92A(2) that the provinces “may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.”

When provincial governments act as monopolists over the sale of liquor, they are constitutionally empowered to do so by section 92(13) and section 92(16). Possible challenges to discriminatory pricing of imported alcohol would be, first, on the grounds of section 91(2), in that the province had entered the federal jurisdiction over international trade and commerce; and, second, on the grounds that the province had imposed an import tax, which is an exercise of federal power under section 91(3).



## *Provincial Barriers and Scope of Federal Trade and Commerce Power*

Could the federal government exercise the trade and commerce power, as currently interpreted by the courts, to legally strengthen the Canadian economic union?<sup>146</sup> Recalling our discussion on marketing boards, we see how the interpretation of section 91(2) has been limited by section 92(13) and section 92(16). As Dickson J. states in the 1983 Supreme Court of Canada decision, *A.-G. Canada v. Canadian National Transportation Ltd.*:

[t]he difficult underlying task facing a court determining the constitutional status of federal economic regulation is, without passing on the substantive merits of the legislation, to assess whether and how far it encroaches on the degree of local autonomy contemplated by the Constitution. It is not surprising that the tenor of what constitutes such an encroachment has varied over time.<sup>147</sup>

The *C.N. Transportation* judgment suggests a new role for the general trade and commerce power that has been upheld in only two minor cases to date.<sup>148</sup> In his minority judgment, Dickson J. outlines the history of the trade and commerce power and goes on to suggest when the general power may be invoked. The proper test, he says, is still whether the legislation deals with a question of general interest throughout the Dominion. However, the regulation of a single trade or business in the province cannot be a question of general interest because “it lies at the very heart of the local autonomy envisaged in the *Constitution Act, 1867*.”<sup>149</sup> Mr. Justice Dickson then sets out the criteria for a valid exercise of the general trade and commerce power. Following Laskin C.J.C. in *Macdonald v. Vapor Canada Ltd.*<sup>150</sup> in the first three criteria, he lists five indicia:

1. the presence of a national regulatory scheme;
2. the oversight of a regulatory agency;
3. a concern with trade in general rather than with an aspect of a particular business;
4. that the provinces jointly or severally would be constitutionally incapable of passing such an enactment; and
5. that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.<sup>151</sup>

He emphasizes that valid federal legislation would have to address “genuinely a national economic concern and not just a collection of local ones.”<sup>152</sup>

It is too soon to tell whether this decision points towards enabling the federal Parliament to enact a national regulatory scheme to deal with intergovernmental economic union matters, should it wish to do so.<sup>153</sup> With respect to barriers to trade in the private sector and competition

policy, the majority in *C.N. Transportation* upheld the right of the Attorney-General of Canada to prefer indictments and have conduct of prosecutions under the *Combines Investigation Act*. Federal jurisdiction over civil remedies under the Act is still uncertain, although Dickson's minority judgment indicates that the Court may be prepared to find them constitutional.<sup>154</sup>

### ***Federal Involvement in Provincial Trade Barriers***

Once again we note federal involvement in the creation or condonation of barriers to interprovincial trade. The federal government itself practises preferential purchasing. With respect to subsidies, financial assistance to businesses is usually coordinated between the provincial and federal governments. The constitutional provisions with respect to natural resource management were a result of federal-provincial negotiations, and federal legislation protects provincial monopolies on the importation of liquor. Consequently, the issue of interprovincial trade barriers cannot be characterized simply as a matter of provincial governments acting in self-serving, protectionist ways.

### **Justifications for Barriers**

Briefly, what are some of the reasons for accepting federal and provincial distortions? What are the tradeoffs if we eliminate the barriers to the free flow of goods within the Canadian economic union?

### ***Federal Distortions***

Energy policies, the tariff and other trade restrictions, the tax system, and freight rates can all be seen as efforts of the federal Parliament to redistribute national wealth. In other words, these are measures of positive integration,<sup>155</sup> based upon the principles of equalization and regional development. The *Constitution Act, 1982* entrenches these principles in section 36, which states:

- 36(1) . . . the government of Canada and the provincial governments, are committed to
- (a) promoting equal opportunities for the well-being of Canadians;
  - (b) furthering economic development to reduce disparity in opportunities and
  - (c) providing essential public services of reasonable quality to all Canadians.

Although section 36 may not be justiciable, the commitments expressed in this provision represent political or moral obligations.<sup>156</sup>

Furthermore, federally induced distortions can be seen as more politically legitimate than distortionary provincial policies. Prichard and



Benidickson argue that the federal government is potentially accountable to both winners and losers from its policies, whereas provincial policies may externalize costs.<sup>157</sup> On the other hand, political factors, such as regional imbalances in federal party support, may mean that federal governments are pressured to design policies that may not maximize net social welfare. It can also be argued that provincial governments cannot externalize all costs; they must be conscious of taxpayer and consumer interests within their jurisdictions. In addition, the possibility of retaliation by other provinces is a check on protectionist measures.<sup>158</sup>

Thus federal redistributive measures which distort the free movement of goods can be linked to the issue of regional representation within central government institutions. If the federal government is perceived to be regionally unrepresentative, its policies may then appear biased toward the regions it does represent. In our examination of federal distortions, however, we have found that no one region is consistently favoured.

However, intergovernmental problems may arise when regions feel unfairly prejudiced by federal policies and yet have no adequate means of having their grievances heard and acted upon.

### *Federal-Provincial Barriers*

Since both levels of government are in agreement with respect to trucking and agricultural marketing policies, there are possibly good reasons for them.

The motor vehicle sector is presently regulated by ten different governments. This situation is said to prevent the formation and implementation of a common national policy on interprovincial trucking,<sup>159</sup> but it may very well be that one common policy is not desirable. A great deal of trucking in Canada is short haul and regional so that there may be justification for provincial jurisdiction. Still, harmonization is necessary; hence the importance of the Canadian Conference of Motor Transport Administrators, a group of federal and provincial government officials who are working on ways to increase uniformity of regulations among the provinces.<sup>160</sup>

Although marketing boards create barriers to the free flow of agricultural products, they do serve a desired function. Government has intervened in agriculture for a number of reasons. First, farm incomes historically have been unstable because prices for agricultural products remain relatively the same despite demand changes, and because supply is unpredictable due to unforeseeable natural conditions. Second, the individual farmer's bargaining power is weak compared to transporters, processors and distributors of farm products. And third, the average net farm income is relatively low. Green suggests that under these condi-

tions, government intervention may be inevitable because farmers are considered to be deserving and essential. Marketing boards are thus an attempt to provide farmers with stable and increased incomes.<sup>161</sup>

In the case of marketing boards, we come back to our discussion of “free trade” and the “free market.” Here interprovincial trade is distorted as an incidental effect of government intervention to correct an unacceptable market situation — the disadvantaged position of farmers.

### *Provincial Barriers*

The major justification for interprovincial trade barriers appears to be the desire to build provincial economies.<sup>162</sup> Sometimes the reason given is dissatisfaction with federal policies, but there may be additional and more specific motives for their imposition. In the case of procurement policies, for example, it may seem obvious that provinces implement preferential purchasing to stimulate local industry, but the reasons listed in a recent Quebec government memorandum were:

- to counterbalance preferential policies practised by other governments;
- to maximize the effects of development and revenue;
- to ensure the lowest possible price by purchasing in large quantities;
- to favour secondary industry; and
- to stimulate the development of small and medium-size business.<sup>163</sup>

Bernier concludes that the Quebec government’s decision to implement a procurement policy is based not on scientific evidence that it is more economically advantageous, but rather on sentiment. Not only is it done because “everyone else is doing it,” but it seems also to reflect a tendency to discriminate in favour of local products.<sup>164</sup>

There are, as well, additional instances where the creation of impediments to trade are indirect and where the purpose of the legislation can be seen to be designed to meet a policy goal not intentionally discriminatory. For example, product standards legislation is essentially designed to meet consumer protection objectives both to ensure uniform methods of analyzing pricing and to promote safer products. The imposition of standards by the state is the result of intense bargaining between producers, consumers, and government; in this way, regionally significant factors can be taken into account in the final decision.

It is not surprising that provinces would attempt, by means of different strategies, to control their own economic welfare; federalism inherently means an acceptance of diverse policies. At the same time, an economic union inherently demands certain common policies. When national economic efficiency is impeded by diversity, competing objectives must be weighed: maximizing national income versus other social, cultural or economic goals. The critical question is, who is to weigh these objectives?



## Conclusions

The theory of gains from trade states that barriers reduce the benefits of economic integration. However, recent studies indicate that in fact Canadian interprovincial trade barriers may currently impose relatively low costs. Federal barriers are much more economically significant, especially energy policies. Thus it would appear that the recent literature and the constitutional discussions have focussed too much on provincial “beggar thy neighbour” policies, while the most distortionary federal policies have been largely ignored.

Legally, the Canadian Constitution to date has not fully protected the concept of an economic union. Section 121, which appears to be a statement entrenching the free movement of goods, has been interpreted to prohibit only customs duties between the provinces, and not non-tariff barriers. Cases regarding economic matters have been decided on the basis of the division of powers: section 91(2), the federal trade and commerce power, versus section 92(13) and (16), the provincial power over property and civil rights and local matters; or section 91(3), federal taxing powers, versus section 92(2), provincial taxing powers.

The federal policies described could not be challenged easily under the Constitution. Federal Parliament acts within its jurisdiction with respect to energy policies, the tariff, the tax system, and freight rates. In the few instances where section 121 has been used to challenge federal laws, they have been upheld under section 91(2). With the federal general trade and commerce power revived in the recent *C.N. Transportation* case, there is even more reason to believe that these policies would be upheld if legally questioned.

It would seem to be equally difficult to challenge federal-provincial barriers. Through the process of delegation, both levels of government support the distortions caused by marketing boards and trucking regulations. In the case of trucking, the federal government could act unilaterally to increase the uniformity of the rules by implementing Part III of the *National Transportation Act*. Instead, the federal government prefers to negotiate harmonization of policies with the provinces.

The main constitutional provisions that can be used to challenge provincial barriers are section 121; the recently enacted and as yet untested section 92A(2); the federal trade and commerce power, section 91(2); and the federal taxing power, section 91(3).<sup>165</sup> When the latter two provisions are used to strike down provincial barriers, the Supreme Court rules that the matter belongs within federal jurisdiction. In other words, the province cannot legislate in a certain manner, but Parliament may if it so chooses. The marketing board cases discussed above illustrate this point. When section 121 is used to invalidate legislation — a rare event at this point in time — the legislated action is prohibited generally. Neither level of government can legislate in this manner, although there is some indication that any court will be predisposed to

validate federal legislation if an interprovincial scheme is supportable as a proper exercise of the trade and commerce power.

Given past and, particularly, recent interpretations, section 91(2) has the most potential to constrain provincial barriers. Although the federal trade and commerce power has been interpreted to extend first over interprovincial and international trade, and second, over general trade and commerce, this second branch of the power has been virtually ineffective. The recent *C.N. Transportation* case may indicate a willingness on the part of the courts to expand this federal power to deal with economic union problems.

If there is evidence that provincial barriers are not an economic threat to national welfare, are there reasons, nonetheless, to constrain them legally? There are at least three reasons for so doing.

First, even if their costs are low now, barriers have the potential to become significant and should therefore be sanctioned. This is a question requiring some economic measurement and expertise. It is also a political question that brings us back to the classic problem of federalism: balancing national economic interests against provincial economic interests.

In the second place, where there is discrimination against an out-of-province supplier, some notion of "economic rights" comes to mind. It may seem offensive to some that the lowest bidder is denied a contract simply on the grounds of province-of-origin. The balancing here has to do with individual "economic rights" versus provincial economic interests. Once again this is a political question.

The third reason has to do with the political costs to federalism when provinces compete instead of cooperate with each other in pursuit of economic goals. We have already remarked that intergovernmental problems may arise when provinces feel unfairly prejudiced by federal policies and yet have no adequate means of having their grievances heard and acted upon. Problems also arise when private interests or other provinces are injured by provincial protectionist activities and yet have no forum to air their complaints. There is an interaction of economic and political factors here that demands some sort of joint federal-provincial body for consultation and cooperation on economic union affairs. Returning to the transcripts of the First Ministers' discussion on powers over the economy, we cite a Manitoba spokesman:

The need is to devise better, more cooperative ways in which provinces and regions can work together with the leadership and support of the federal government to achieve the economic goals that we want in the regions and in the nation. But we must do that . . . without removing the ability of people in any part of this country to use their provincial governments in an affirmative way to achieve their objectives.<sup>166</sup>

It is not within the scope of this paper to review extensively the range of legal and institutional options for dealing with mobility of goods within



an economic union. That has been done by Bernier and Roy in this volume and by others elsewhere.<sup>167</sup>

After examining the issues and the existing law, we conclude that major constitutional change is not necessary at this time. Evidence of the cost of barriers is not sufficient to support a major overhaul. Furthermore, we believe that existing and future impediments to trade can be constrained by present constitutional provisions. Section 121 has the potential to become a statement of commitment to the free flow of goods within the union by being interpreted as prohibiting both tariff and non-tariff barriers, if we understand the economic basis for such a statement and are prepared with convincing arguments for that interpretation.

## Notes

This study was completed in December 1984.

1. See D.G. Creighton, *British North America at Confederation: A Study Prepared for the Royal Commission on Dominion-Provincial Relations* (Ottawa: Queen's Printer, 1963), pp. 40–48; G.V. La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (Toronto: Canadian Tax Foundation, 1981), p. 6; R. Bastien, *Federalism and Decentralization: Where Do We Stand?* (Ottawa: Minister of Supply and Services, 1981), p. 1.
2. Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), p. 470.
3. See A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974); A.E. Safarian, *Ten Markets or One? Regional Barriers to Economic Activity in Canada*, Discussion Paper (Toronto: Ontario Economic Council, 1980); Hon. J. Chrétien, *Securing the Canadian Economic Union in the Constitution* (Ottawa: Minister of Supply and Services Canada, 1980); F.R. Flatters and R.G. Lipsey, *Common Ground for the Canadian Common Market* (Montreal: Institute for Research on Public Policy, 1983).
4. Flatters and Lipsey, *supra*, note 3, p. 23; See also Chrétien, *supra*, note 3, p. 3; and T.J. Courchene, "Analytical Perspectives on the Canadian Economic Union," in *Federalism and the Canadian Economic Union*, edited by M.J. Trebilcock et al. (Toronto: Ontario Economic Council, 1983), p. 71.
5. Courchene, "Analytical Perspectives on the Canadian Economic Union," *ibid.*, p. 70.
6. Caroline Pestieau, "Whither the Canadian Common Market?" in *Key Economic and Social Issues of the Early 1980s*, edited by Charles A. Barrett (Ottawa: Conference Board of Canada, 1980), p. 49.
7. M.J. Trebilcock, et al. *Federalism and the Canadian Economic Union* (Toronto: Ontario Economic Council, 1983), chaps. 4 to 6; see also J. Whalley, *Regional Aspects of Confederation*, volume 68 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
8. Thomas J. Courchene, *Economic Management and the Division of Powers*, volume 67 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
9. J.R.S. Prichard and J. Benidickson, "Securing the Canadian Economic Union," in *Federalism and the Canadian Economic Union*, edited by M.J. Trebilcock et al. (Toronto: Ontario Economic Council, 1983), p. 8.
10. See Canada, *Federal-Provincial Conference of First Ministers on the Constitution: Verbatim Transcript*, vol. II (Ottawa: Canadian Intergovernmental Conference Secretariat, 1980), pp. 770–889.
11. *Ibid.*, at p. 775 (Premier William Davis).

12. *Ibid.*, at p. 835 (Nova Scotia).
13. Saskatchewan, "Saskatchewan Position on Powers Over the Economy," Constitutional Document: 800-14/028.
14. Whalley, *supra*, note 7; and J. Whalley, "Induced Distortions of Interprovincial Activity: An Overview of Issues," and "The Impact of Federal Policies on Interprovincial Activity," in *Federalism and the Canadian Economic Union*, edited by M.J. Trebilcock et al. (Toronto: Ontario Economic Council, 1983), pp. 161–200 and pp. 201–42 respectively.
15. Whalley, "The Impact of Federal Policies," *supra*, note 14.
16. *Ibid.*, at p. 203.
17. John Bishop Ballem, "Oil and Gas Under the New Constitution" (1983), 61 *Can. Bar Rev* 547 at pp. 553–56; The real question, Ballem says, is whether the province's power to exercise its jurisdiction vis-à-vis the federal government has also been enlarged. To assess the position of the two governments, he identifies a problem (a marketing crisis) where the federal government and Alberta would not agree on the solution. Under the federal trade and commerce power, the federal government can fix the price of a commodity exported from the country. If Alberta cut back production in defiance of federal actions, Ballem says that Ottawa could counteract by exercising its power to make laws for peace, order and good government. The courts have held that the "peace, order, and good government" power can be invoked with regard to a matter of national concern (*A.-G. Ont. v. Canadian Temperance Federation*, [1946] A.C. 193) or where there is a real or apprehended emergency (*Re Anti-Inflation Act*, [1976] 2 S.C.R. 373). The federal government could also invoke the declaratory power, but that would be a very drastic and unlikely measure. There would appear to be little that the provinces could do about the federal government's actions. Therefore, Ballem concludes that while the legislative jurisdiction of the provinces has been increased by section 92A of the *Constitution Act, 1982*, the overall balance of legislative power between the two levels of government remains essentially the same.  
See also N.D. Bankes, C.D. Hunt, and J.O. Saunders, "Energy and Natural Resources: The Canadian Constitutional Framework," in *Case Studies in the Division of Powers*, volume 62 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1986); see also the section, *infra*: "Government as Owner-Conservator-Manager: Natural Resource Policies."
18. *Reference re Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004.
19. *Ibid.*, at pp. 1041–42.
20. J. Whalley, "The Impact of Federal Policies," *supra*, note 14, pp. 208–10; see also Whalley, *Regional Aspects of Confederation*, *supra*, note 7.
21. See C. Hamilton and J. Whalley, "Non-Tariff Barriers and Canadian Trade Policy: Summary of the Proceedings of a Research Symposium," in *Canada and the Multilateral Trading System*, volume 10 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985) and Andrew R. Moroz, "Some Observations on Non-Tariff Barriers and Their Use in Canada," a paper prepared for the Royal Commission's research symposium on the GATT and Non-Tariff Barriers held in Ottawa December 2, 1983.
22. See G.V. La Forest, *The Allocation of Taxing Power under the Canadian Constitution* (Toronto: Canadian Tax Foundation, 1981), p. 39: referring to *A.-G. B.C. v. A.-G. Can. (Johnny Walker)*, [1924] A.C. 222; and *Croft v. Dunphy*, [1933] A.C. 156.
23. [1982] 1 S.C.R. 1004.
24. *A.-G. B.C. v. A.-G. Can.*, [1924] A.C. 222.
25. [1982] 1 S.C.R. 1004 at p. 1069.
26. Whalley, "The Impact of Federal Policies," *supra*, note 14, pp. 210–11.
27. Hogg, *supra*, note 2, at p. 399.
28. *Ibid.*, at p. 400.



29. *Caron v. The King*, [1924] A.C. 999.
30. Hogg, *supra*, note 2, at p. 400; see also La Forest, *supra*, note 22, pp. 51–53.
31. Whalley, “The Impact of Federal Policies,” *supra*, note 14, pp. 211–13; see also Kenneth H. Norrie, “Not Much to Crow About: a Primer on the Statutory Grain Freight Rate Issue,” *Canadian Public Policy* (December 1983): 432–45.
32. See R.E. Haack, D.R. Hughes, and R.G. Shapiro, *The Splintered Market: Barriers to Interprovincial Trade in Canadian Agriculture* (Toronto: Canadian Institute for Economic Policy, 1981), pp. 3–8.
33. S.C. 1980–81–82–83, c. 168.
34. *The Globe and Mail*, March 19, 1984, p. B7.
35. Norrie, *supra*, note 31, pp. 442–43.
36. R.S.C. 1970, c. M-3.
37. R.S.C. 1970, c. A-18.
38. See Haack et al., *supra*, note 32, pp. 2–13.
39. See Nicolas Roy, “The Trans Quebec & Maritimes Pipeline Project: The Jurisdictional Debate in the Area of Land Planning” (1982), 23 *Cahiers de Droit* 175.
40. See Colin H. McNairn, “Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction” (1969), 47 *Can. Bar Rev.* 355; see also Hogg, *supra*, note 2, pp. 322 and 329.
41. *Canadian National Railways Act*, R.S.C. 1970, c. C-10, as amended, s. 16 and *Consolidated Railway Act*, S.C. 1883, 46 Vict. c. 24, s. 6.
42. *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434.
43. Hogg, *supra*, note 2, at p. 331.
44. *Saskatchewan Power Corp. and Many Islands Pipe Lines Ltd. v. TransCanada Pipelines Ltd.*, [1979] 1 S.C.R. 297.
45. Michael J. Trebilcock, et al. “Provincially Induced Barriers to Trade in Canada,” in *Federalism and the Canadian Economic Union*, edited by M.J. Trebilcock et al. (Toronto: Ontario Economic Council, 1983), pp. 247–53.
46. *A.-G. Ontario v. Winner*, [1954] A.C. 541; also *R. v. Sterritt Trucking Inc.*, [1973] 3 O.R. 294 (Ont. Co. Ct.); *Re H & M Express Lines Ltd. and Highway Traffic and Motor Transport Board* (1969), 3 D.L.R. (3d) 69 (Man. C.A.).
47. *Toronto v. Bell Telephone Co.*, [1905] A.C. 52.
48. *A.-G. Ontario v. Winner*, [1954] A.C. 541 at p. 576.
49. [1954] A.C. 541 at p. 576.
50. S.C. 1953–54, c. 59.
51. Hogg, *supra*, note 2, at p. 229.
52. [1968] S.C.R. 569; see also *ibid.*
53. [1972] S.C.R. 359.
54. Hogg, *supra*, note 2, at p. 232.
55. S.C. 1966–67, c. 69.
56. See Richard J. Schultz, *Federalism, Bureaucracy, and Public Policy* (Montreal: McGill-Queen’s University Press, 1980).
57. See Christopher Green, “Agricultural Marketing Boards in Canada: An Economic and Legal Analysis” (1983), 33 *U.T.L.J.* 407 at pp. 407–408. Green refers to Sullivan, *A Statistical Summary of Marketing Boards in Canada 1979–1980* (Ottawa: Minister of Supply and Services Canada, 1981), p. 1; Sullivan credits the definition to Hissocks, *Market Regulation in Canada* (Ottawa: Department of Agriculture, Canadian Farm Economics Branch, 1972), p. 20.
58. See Haack, et al., *supra*, note 32, at p. 5.
59. S.C. 1970–71–72, c. 65.
60. See Trebilcock, et al., *supra*, note 45, pp. 254–57; see also Green, *supra*, note 57, at p. 410.

61. *Citizens Ins. Co. v. Parsons* (1881), 7 App. Cas. 96.
62. See T. Bradbrooke Smith, "Chickens and Eggs: Marketing and Trade and Commerce Power" (1978), *Law Society of Upper Canada Special Lectures* 135 at p. 137; see also Claude Regnier and Serge LaFontaine, "Derniers développements dans la mise en marché des produits agricoles" (1984), 44 *Revue du Barreau* 309.
63. *R. v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; *Canadian Federation of Agriculture v. A.G. Quebec*, [1951] A.C. 179.
64. S.B.C. 1926-27, c. 54.
65. *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357.
66. 24-25 Geo. V., c. 57, as amended in 1935 by 25-26 Geo. V. c. 64.
67. *A.-G. B.C. v. A.-G. Can.*, [1937] A.C. 377; aff. *Reference re the Natural Products Marketing Act, 1934*, [1936] S.C.R. 398.
68. [1937] A.C. 377 at p. 389.
69. S.C. 1949 (1 Sess.), c. 16.
70. [1952] 2 S.C.R. 392.
71. [1968] S.C.R. 569.
72. *Ibid.*, at p. 575.
73. See Rand J. in *Reference re the Farm Products Marketing Act*, [1957] S.C.R. 198 at p. 214:  

It follows that trade regulation by a Province or the dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufactures of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action; this, as in some situations already in effect, may take the form of a single board to administer regulations of both on agreed measures.

See also Smith, *supra*, note 62, 135 at p. 142.
74. [1957] S.C.R. 198.
75. *Ibid.*, at p. 204.
76. See Patrick Monahan, "The Supreme Court and the Economy," in *The Supreme Court of Canada as an Instrument of Political Change*, volume 47 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
77. [1968] S.C.R. 238.
78. *Ibid.*, at p. 254.
79. *A.-G. Man. v. Man. Egg and Poultry Assn.*, [1971] S.C.R. 689.
80. *Ibid.*, at p. 703.
81. S.C. 1970-71-72, c. 65.
82. [1978] 2 S.C.R. 1198 at p. 1297.
83. See Green, *supra*, note 57, at pp. 425-27: A board cannot delegate powers to itself or give itself powers substantially different from those that the statute provides. It cannot repeat the power in a regulation in the words in which it was conferred; it must base its application of those powers on specific and objective criteria. In the absence of an explicit legislated provision, the board cannot establish its own body to resolve disputes between parties affected by the board's actions. If a board is acting within the powers conferred to it, it need not account for the wisdom, fairness or substantive basis of its decisions, but it cannot vindictively harass a person to drive him or her out of business.
84. See Chrétien, *supra*, note 3, at p. 2.
85. (1922), 62 D.L.R. 62.
86. [1943] A.C. 550.
87. [1958] S.C.R. 626.
88. *Ibid.*, at p. 642.



89. [1978] 2 S.C.R. 1198.
90. *Ibid.*, at pp. 1267–68.
91. But see Michael Penny with Michael J. Trebilcock and John B. Laskin, “Existing and Proposed Constitutional Constraints on Provincially Induced Barriers to Economic Mobility in Canada,” in *Federalism and the Canadian Economic Union*, edited by M.J. Trebilcock et al. (Toronto: Ontario Economic Council, 1983), at p. 505.
92. See the section, *supra*: “The Tariff.”
93. Ivan Bernier, “Le concept d’union économique dans la Constitution canadienne: de l’intégration commerciale à l’intégration des facteurs de production” (1979), 20 *Cahiers de Droit* 177 at pp. 188–89.
94. *Ibid.*
95. La Forest, *supra*, note 1, at p. 3.
96. [1930] A.C. 357.
97. [1960] S.C.R. 713.
98. [1978] 2 S.C.R. 545.
99. See Hogg, *supra*, note 2, at p. 103; see also William D. Moull, “Section 92A of the Constitution Act, 1867” (1983), 61 *Can. Bar Rev.* 715 at p. 718.
100. See Trebilcock, et al. *supra*, note 45, at pp. 244–47 for a survey of explicit provincial preferences.
101. *Ibid.*, at p. 244.
102. Bernier, *supra*, note 93, at p. 206.
103. But two have come close to the issue. In *Ascenseurs Alpin-Otis Cie Ltée v. Procureur Général*, [1971] C.S. 243 the Quebec Supreme Court held that the Department of Public Works’ stated preference for contractors and subcontractors with a principal business in Quebec did not constitute a formal rejection of outside subcontractors. In *Leo Lisi Ltd. v. Province of New Brunswick* (1975), 11 N.B.R. (2d) 701, the New Brunswick Supreme Court, Appeal Division decided that the Province-defendant did not owe a duty to the plaintiff to disclose, in tender documents, the “preferential policy” as one of the reasons for the tender rejection. The Court concentrated on the contractual nature of that case. Therefore, it is difficult to draw any conclusions about the constitutionality of procurement policies from either of these cases.
104. Emilio S. Binavince, “The Impact of the Mobility Rights: The Canadian Economic Union — a Boom or a Bust?” (1982), 14 *Ottawa L. Rev.* 340 at p. 356.
105. See Robin Elliott, “Interpreting the Charter — Use of the Earlier Versions as an Aid” (1982), 16 *U.B.C. Law Rev.* 11.
106. See Hogg, *supra*, note 2, p. 25.
107. “Regulation respecting Government purchase contracts,” O.C. 2591-77 (1977), 109 (37) *Quebec Official Gazette* (Part 2) 4655, 10 August 1977; see Trebilcock, et al. *supra*, note 45, at pp. 243–47 for a survey of procurement policies.
108. See Government of Alberta, *White Paper: Proposals for an Industrial and Science Strategy for Albertans 1985 to 1990* (Edmonton: Queen’s Printer, 1984).
109. P. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (Toronto: Gage, 1982), p. 112–13; see also J. Peter Johnson, *Government Financial Assistance Programs in Canada*, 2d ed. (Montreal: Price Waterhouse, 1982), p. 207 et seq.; and Bernier, *supra*, note 93, pp. 196–97.
110. Trebilcock, et al., *supra*, note 45, at pp. 257–58.
111. Johnson, *supra*, note 109, at p. 207.
112. *A.-G. Can. v. A.-G. Ont. (Unemployment Insurance)*, [1936] S.C.R. 427 at p. 434.
113. *Dow v. Black* (1873–76) *Canadian Reports* [7] A.C. 382.
114. La Forest, *supra*, note 1, at p. 75.
115. Bernier, *supra*, note 93, at p. 197.
116. *Ibid.*

117. *The Financial Post*, June 16, 1984, p. 6; see also Haack, Hughes and Shapiro, *supra*, note 32, at p. 50 for examples of barriers created through grades and standards manipulation and inspection practices; and Bernier, *supra*, note 93, at pp. 191–93 for examples of conditions imposed upon live agricultural imports: bees, plants, animals.
118. *A.-G. Can. v. A.-G. Ont.* (Labour Conventions), [1937] A.C. 326.
119. See Ivan Bernier, “Product Standards and Non-Tariff Obstacles: the GATT Code on Technical Barriers to Trade,” in *Non-Tariff Barriers after the Tokyo Round*, edited by John Quinn and Philip Slayton (Montreal: Institute for Research on Public Policy, 1982), pp. 195–224; see also Chrétien, *supra*, note 3, at pp. 23–24, 37.
120. See Penny with Trebilcock and Laskin, *supra*, note 91, at pp. 509–11.
121. *R. v. Wetmore*, [1983] 2 S.C.R. 284 at p. 288.
122. [1978] 2 S.C.R. 662.
123. [1978] 2 S.C.R. 211.
124. *Capital Cities Communications Inc. v. C.R.T.C.*, [1978] 2 S.C.R. 141.
125. See James C. MacPherson, “Economic Regulation and the British North America Act: Labatt Breweries and Other Constitutional Imbroglios” (1980–81), 5 *Can. Bus. L.J.* 172.
126. [1980] 1 S.C.R. 914.
127. *Ibid.*, at p. 943.
128. See Monahan, *supra*, note 76, chap. 3 and Neil Finkelstein, “Notes of Cases: Constitutional Law — Competition Legislation” (1984), 62 *Can. Bar Rev.* 182 at pp. 194–96.
129. [1980] 1 S.C.R. 844.
130. See Bernier, *supra*, note 119, at pp. 204–205.
131. Trebilcock, et al. *supra*, note 45, at pp. 260–63.
132. (1900), 27 O.A.R. 172.
133. [1923] A.C. 450.
134. [1924] A.C. 203.
135. [1982] 1 S.C.R. 1004 at p. 1032; see also S.I. Bushnell, “Comments: Constitutional Law — Proprietary Rights and the Control of Natural Resources” (1980), 58 *Can. Bar Rev.* 157; and William D. Moull, “Natural Resources: Provincial Proprietary Rights, The Supreme Court of Canada, and the Resource Amendment to the Constitution” (1983), 21 *Alta. L. Rev.* 472 at 479:  

What the Crown could do by contract in *Brooks-Bidlake* it could not do solely by legislation under the same circumstances. Legislation enacted under s. 92(5) thus stands in no better position as regards federal legislation and federal legislative authority than does any other provincial legislation enacted under s. 92. The Crown-proprietor *can* do more than the Crown-legislator, but must do so by appropriately-framed contractual conditions attached to its disposition of Crown-owned resources.
136. [1978] 2 S.C.R. 545.
137. [1979] 1 S.C.R. 42.
138. Bankes, Hunt, and Saunders, *supra*, note 17.
139. See John D. Whyte, “The Constitution and Natural Resource Revenues,” Discussion Paper 14 (Kingston: Queen’s University, Institute of Intergovernmental Relations, 1982), pp. 15–16.
140. Trebilcock, et al., *supra*, note 45, at pp. 263–66.
141. Bernier, *supra*, note 93, and Bernier, “Le GATT et le problème du commerce d’état dans les pays à économie de marché: le cas des monopoles provinciaux des alcools au Canada” (1975), 13 *Canadian Yearbook of International Law* 98.
142. [1977] 2 S.C.R. 504.
143. (1978), 84 D.L.R. (3d) 257.
144. R.S.C. 1970, c. I-4.



145. See H. Scott Fairley, "Constitutional Aspects of External Trade Policy," in *Case Studies in the Division of Powers*, volume 62 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), wherein is cited the case of *King c.o.b. Winchester's Dining Lounge and Tavern v. Liquor Control Board of Ontario* (1981), 21 C.P.C. 194 in which this was the challenge to Ontario liquor policies. Recently both the EEC and the U.S.A. have complained to GATT officials about Canadian (Ontario) discrimination against European and American wine, beer, and spirits. See *The Globe and Mail*, June 9, 1984, p. B2.
146. See Monahan, *supra*, note 76; and John Whyte, "Constitutional Aspects of Economic Development Policy," in *Division of Powers and Public Policy*, volume 61 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985).
147. [1983] 2 S.C.R. 206 at p. 260.
148. *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; and *A.-G. Ont. v. A.-G. Can.* (Canada Standard Trade Mark), [1937] A.C. 405.
149. [1983] 2 S.C.R. 206 at p. 267.
150. [1977] 2 S.C.R. 134.
151. [1983] 2 S.C.R. 206 at pp. 267–68.
152. *Ibid.*, at p. 268.
153. See Whyte, *supra*, note 146.
154. Finkelstein, *supra*, note 128, at p. 182.
155. See Ivan Bernier, et al., "The Concept of Economic Union in International and Constitutional Law," in *Perspectives on the Canadian Economic Union*, volume 60 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), pp. 181–83.
156. Hogg, *supra*, note 2, at p. 84.
157. Prichard and Benidickson, *supra*, note 9, at pp. 49–50.
158. Trebilcock, et al., *supra*, note 7, at p. 558.
159. Charles M. Dalfen and Laurence J.E. Dunbar, "Transportation and Communications: The Constitution and the 'Canadian Economic Union'," in *Case Studies in the Division of Powers*, volume 62 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985), p. 118.
160. Michael J. Trebilcock, et al., *supra*, note 45, at p. 253.
161. Green, *supra*, note 57, at pp. 408–409.
162. See Report of the Royal Commission on Dominion-Provincial Relations, Book II (Ottawa: King's Printer, 1940), pp. 62–63; Safarian, *Ten Markets or One?* *supra*, note 3, at p. 10; J. Maxwell and C. Pestieau, *Economic Realities of Contemporary Confederation* (Montreal: C.D. Howe Research Institute, 1980), pp. 77–91; Pestieau, *supra*, note 6, p. 41 at 46–47; Flatters and Lipsey, *supra*, note 3, at pp. 40–46.
163. Ivan Bernier, "L'économie québécoise face à la concurrence extérieure: les fondements scientifiques de la politique d'achat préférentiel du Québec" (1984), 15 *Revue Études Internationales* 61 at 86 (Authors' translation).
164. *Ibid.*, at p. 92.
165. It is important to keep in mind the way in which courts characterize laws. See Hogg, *supra*, note 2, at pp. 80–95. The "pith and substance" doctrine of constitutional law, for example, permits the Court to weigh provincial aspects against federal aspects of the legislation in question. This doctrine allows one level of government to enact legislation which is "in relation to" a subject falling within its jurisdiction while at the same time it incidentally "affects" a matter in the other level of government's jurisdiction. The *Carnation* case, mentioned above, illustrates the application of this doctrine. In that case the Court upheld provincial marketing legislation because it was

in relation to local matters, and it merely affected interprovincial trade. In the *Manitoba Egg* case, the provincial legislation was struck down because it was held to be in relation to — and not merely affect — interprovincial trade.

166. See Canada, *Federal-Provincial Conference of First Ministers on the Constitution: Verbatim Transcript*, vol. II (Ottawa: Canadian Intergovernmental Conference Secretariat, 1980), p. 864 (Hon. Donald Craik, minister of finance, government of Manitoba).
167. See Prichard and Benidickson, *supra*, note 9, at pp. 27–48; see also Penny, et al., *supra*, note 91, at pp. 503–514.

For comparative studies see J.A. Hayes, *Economic Mobility in Canada: A Comparative Study* (Ottawa: Minister of Supply and Services Canada, 1982; see also Bernier et al., *supra*, note 155).





## **Mobility Rights:** *Personal Mobility and the Canadian Economic Union*

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### **Introduction**

Economic theory suggests that mobility of the factors of production is essential to an efficient economy. The Fathers of Confederation recognized the strength inherent in an integrated economy and made provision therefor in the Articles of Confederation and more particularly in section 121 of the (then) *British North America Act*.<sup>1</sup> Their model has fallen far short of providing a flexible blueprint for the changing needs of the Canadian federation. The failure of the federal and provincial governments to achieve an integrated economic association has been well documented. This study will examine the constitutional structure upon which the mobility rights of Canadians are built and some of the existing impediments to the full exercise of those rights. Arguments for and against enhanced mobility will be considered. The lessons of other jurisdictions will be canvassed, as will recent judicial interpretation of section 6 of the *Canadian Charter of Rights and Freedoms*.

### **Importance of Mobility Rights in the Canadian Economic Union**

#### ***Economic Importance: The Economic Theory of the Benefits of Mobility of Factors of Production***

Economic theory posits that mobility of the factors of production results in an efficient economy. Safarian, in his now classic study, *Canadian Federalism and Economic Integration*,<sup>2</sup> described a four-step process in economic and political integration.<sup>3</sup> He suggests the development of an integrated economy from a basic "free trade area" through a "customs

union” to “common market” to “economic union.” In theory, the higher the level of economic integration achieved by a state, the more efficient its economy. An alternative paradigm<sup>4</sup> for the progression of the levels of economic integration suggests that development proceeds from the freeing of barriers to trade, to the liberalization of factor movement, to integration of national economic policy and, finally, to the total unification of national economic policy. It is generally recognized that the most appropriate description for the level of economic integration current in the Canadian federation lies somewhere between a customs union and a common market.<sup>5</sup> This description may no longer be apt given the provisions of section 6 of the *Canadian Charter of Rights and Freedoms*,<sup>6</sup> which provides specifically for a guarantee of mobility rights to individuals within the Canadian federation.

The theoretical structure of the progression of levels of economic integration is an extremely useful one. Nonetheless, it must be recognized that at any given time, in any economy, certain elements of economic policy may better reflect one level of integration while other aspects of economic policy might better be characterized at another level. In addition, there are pressures brought to bear on the constituent elements of the Canadian federation, beyond the economic benefit to be gained from a higher level of economic integration. Furthermore, the theoretical benefit to be gained may not be borne out by the actual implementation of economic theory.

The benefits of economic integration are postulated to be several. These advantages are perhaps most clearly outlined by Judith Maxwell and Caroline Pestieau in their study *Economic Realities of Contemporary Federation*.<sup>7</sup> While these benefits result from economic integration per se and not solely from that aspect of an integrated economy that provides for mobility of factors, the benefits of general economic integration are those of mobility of factors, writ large. Maxwell and Pestieau suggest that these benefits are essentially four.<sup>8</sup>

First, economies of scale and specialization result in gains from trade among the participant provinces in the form of more efficient production and higher incomes. Second, economic integration allows for compensation and insurance programs designed to pool the risk of the cyclical fluctuations that impact on all sectors of the economy from time to time. The insurance nature of economic integration not only protects regions from the full brunt of short-term negative impact of cyclical fluctuations, but provides the resources necessary to allow the temporarily disadvantaged region to make a speedier recovery. Third, economic integration provides for an efficient sharing of the cost of joint ventures such as transportation and defence. Sharing the cost of national requirements allows for cost efficiencies as well as an improvement in the quality of the resulting product. Fourth, an integrated economy, particularly where there is some level of harmonization of economic policy, increases the



ability of the federation to bargain effectively in the international market. Economic theory argues that mobility of the factors of production leads to increased specialization and therefore increased efficiency and higher per capita income. Constitutional arrangements pre-dating section 6 of the *Canadian Charter of Rights and Freedoms* are seen as legitimizing legal impediments to mobility of factors of production and, therefore, as a deficiency in the constitutional structure.

Personal mobility is more complex than the removal of all impediments to interprovincial mobility of labour. Impediments to mobility within a province (regional mobility) may be of equal significance. However, the constitutional constraints that operate within a region are fewer. Individuals are unlikely to move to the region in which their services will be most efficiently utilized unless information has been provided to indicate those regions in which their services might be offered most advantageously, unless provision is made for reasonable uniformity in the level of social services available, and unless the quality of life in terms of income levels and institutional support systems is perceived as comparable to or better than that of their present situation. Lack of information, lack of institutional support or discriminatory barriers to social services render legal recognition of mobility rights hollow.<sup>9</sup>

True mobility of labour, in the terms suggested above, should contribute to increased economic efficiency at the national level. However, as individuals move to the province or region in which their personal services are most effectively used, other regions suffer a corresponding loss of residents. These fluctuations in population at the regional or provincial level may be short term only. In other cases, mobility of labour may result in certain regions of the Canadian federation suffering significant and permanent population loss. Regions or provinces in such a position can hardly be expected to applaud the increase in the economic welfare of the nation as a whole. This, and other social and political concerns, must impact on national planning for national economic policy.<sup>10</sup>

It follows from this exceedingly oversimplified description, that a failure of the economic benefits of mobility to materialize will fuel arguments against full mobility rights for Canadians. Further, perceived failure of national economic policy in any sector of the economy may well have a negative impact on national willingness to guarantee mobility rights. An integrated economic federation will fail where it is run inefficiently so that economic benefits that ought to be achieved are not realized. It will fail where achieved benefits are distributed in a discriminatory fashion or in a way that is perceived to be unjustifiably discriminatory. Values other than economic efficiency may be so significant as to result in the destruction of the political federation, despite achieved benefits to the nation as a whole. Finally, where the insurance function

of the economic union is distorted into a permanent feature and comes to dominate the economic relationship of the member provinces, dissatisfaction on the part of the subsidizing provinces will result in severe stress, if not breakdown of the economic federation. Economically unsuccessful regions receiving constant subsidy must begin to feel that recovery of autonomy in matters of economic policy would be beneficial to the regional economy.<sup>11</sup>

Finally, constitutional recognition of mobility rights for Canadians cannot be allowed such precedence that other values are ignored. Canada is a nation, not a theoretical economic model. Mobility rights may not be granted such a place of constitutional priority that other requirements of economic efficiency and political necessity are distorted or suppressed. Where mobility rights are granted, an extreme view could characterize any and all provincial or federal attempts to plan economic development as impediments to the free exercise of mobility rights. Such a result would destroy any hope for a Canadian common market and a fully and appropriately integrated economy. Mobility rights are one of the building blocks of an integrated economy; but the Canadian common market and the Canadian nation cannot be built on mobility rights alone.

### ***Political Importance:***

#### ***Mobility Rights as Political Rights — Importance of Mobility Rights in Fostering a Sense of Nationhood and Canadianism***

Mobility rights are more than simple building blocks for an integrated and effective Canadian economy. The right to move, to take up residence and to work is fundamental to our sense of personal freedom and to our sense of the Canadian nation. The right of the dissatisfied or oppressed to look elsewhere is a tradition of free and democratic societies. In Canada, in many ways a nation of newcomers, freedom to look elsewhere is an important value. For this reason, when we speak of constitutional protection for mobility rights for Canadians, we must not lose sight of the fact that economic arguments do not constitute the only rationale, or even perhaps the most significant one, for the clear and uncompromised recognition of such rights. The right to move and to take up residence anywhere in Canada is fundamental to our sense of ourselves as a nation, not simply residents of a region or province. Impediments to mobility impact on more than economic efficiency; they impact on our sense of ourselves as a nation.<sup>12</sup>

The *Canadian Charter of Rights and Freedoms* recognizes and entrenches mobility rights for all Canadians. This Canadian expression echoes recognition of this same right in other national and international contexts. Entrenchment of mobility rights in the Charter is not the first Canadian expression of the fundamental principle of the right to mobility. The most famous pre-Charter expression of mobility rights are the



remarks made by Mr. Justice Rand in *Winner v. S.M.T. (Eastern) Ltd.*:<sup>13</sup>

. . . [A] province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action.

Lessons from other jurisdictions are useful for a critical appraisal of the success or failure of Canadian provisions. The right to personal mobility is fundamental. This is confirmed by inclusion of the right in the International Covenant on Civil and Political Rights.<sup>14</sup> Article 12 of that covenant provides for extensive mobility rights for the citizens of signatories.

Mobility rights are also one of the cornerstones of the European Economic Community (EEC).<sup>15</sup> Title 3 of the Treaty Establishing the European Economic Community provides for the free movement of persons, services and capital.<sup>16</sup> One of the objectives of the EEC is the elimination of barriers to free movement of persons and services.<sup>17</sup>

Protection for mobility rights is provided by the U.S. Constitution. The Articles of Confederation, which constitute the predecessor document to the U.S. Constitution, specifically recognized freedom to move across state lines and to engage in commercial activity in any state,<sup>18</sup> but its language is not specifically entrenched in the U.S. Constitution. Rather, elements of Article 4 of the Articles of Confederation appear transformed in Article 4, section 2, the “privilege and immunities” clause, and in Article 1, section 8, the “commerce” clause,<sup>19</sup> of the constitution. A third source of constitutional entrenchment for mobility rights in the U.S. Constitution is the “right to travel” and to “equal protection.” Equal protection is provided by the Fourteenth Amendment. No state may “deny to any person within its jurisdiction the equal protection of the laws.”

These several texts constitute historical sources for section 6 of the *Canadian Charter of Rights and Freedoms*. The provisions of the EEC and of U.S. constitutional law are of sufficient complexity and subtlety to be profitable sources for Canadians in their search for appropriate content for entrenched mobility rights. The lessons to be gained from these sources will be examined in greater detail under “Lessons from other jurisdictions” below. They are referred to briefly here to indicate that other democratic societies place more than mere economic importance on the entrenchment of mobility rights.

### ***Conflicting Values:***

#### ***Nation Building and Province Building;***

#### ***Mobility Rights and the Goals of the Canadian Federation***

Constitutional entrenchment of mobility rights satisfies both economic and political imperatives. Mobility rights theoretically result in a more

efficient economy and satisfy our sense of being Canadians with a right to live and work anywhere within Canada. However, other values of economic and political importance exert an equal and opposite effect. Provincial and regional objectives for economic self-sufficiency press against the federation's ability to agree to economic policies designed to result in a nationally efficient economy. Policies designed to further the objectives of a particular region or province or to ensure that residents enjoy a certain standard of living and level of public services may conflict with policies designed to further overall national economic efficiency. These tensions manifest themselves in policy conflicts between provincial and federal governments. They are often the source of the institutional impediments to mobility canvassed in the next section. Any discussion of constitutional entrenchment of mobility rights for Canadians and of institutional mechanisms designed to further that economic and political imperative must occur within a context that takes provincial values into account. There is conflict between nation building and province building; each responds to a differing set of parameters. The purpose of this study, and of all constitutional negotiation, is to design mechanisms best able to serve both objectives.

Pestieau attributes three bases to province building: improvement of the industrial structure, advancement of social and cultural goals and insurance against cyclical performance.<sup>20</sup> These do not differ from federal objectives. However, provincial governments are responsible only to provincial constituencies. This may result in provincial policies at odds with the requirements of an integrated national economy. Provincial dissatisfaction with federal economic policy arises from a belief that the provincial or regional economy has been short-changed by federal policies and that provincial control would result in greater economic well-being for the residents of that region. Other values also impact on provincial response to federal economic and social planning. The views of the province of Quebec with regard to language and culture are the most obvious examples of non-economic provincial interests at odds with federal policy. Provincial attempts to further provincial goals may impact negatively on federal economic policy.

Rationalization of economic policy requires regional specialization. Specialization makes regional governments uncomfortable. They are aware of the risks involved in specialization and may have little confidence in federal ability or willingness to provide appropriate economic response to down-side cycles. Provinces are continually pressing for greater control over and diversification of regional economies. In addition, not even the federal government is prepared to allow the full impact of the natural economic strengths or weaknesses of Canada's regions to filter down through the economy and impact directly on the level of income and of services. Both levels of government realize that differences of that degree in levels of economic well-being would be detrimen-



tal to our sense of ourselves as a nation. For this reason, federal transfer programs and regional stabilization policies have provided large transfers of funds to the various disadvantaged regions. We will look at the impact of such policies on mobility in the next section. We refer to these policies now because, while designed to give financial support, they contribute to a provincial sense that autonomy and control over the local economy have been sacrificed in exchange for federal funds. In the extreme, the provincial response complains that they have sold their birthright for a mess of pottage. When we consider that 60 percent of the revenue of Prince Edward Island is in the form of federal transfers, we can begin to understand why provinces may feel an inability to control their own economic destinies.<sup>21</sup>

For these reasons the provinces argue for greater autonomy in the use and distribution of transferred funds.<sup>22</sup> At the same time, the degree of federal transfers to the disadvantaged regions of Canada has protected those governments from the full consequences of regional economies and provincial policies. Courchene argues that this results in an illusion of relative well-being sufficient to reduce the accountability of provincial governments. The level of federal transfers and equalization payments and the 50 percent federal contribution to welfare are cited by Courchene as insulating provincial governments from the consequences of their own inappropriately high minimum-wage laws.<sup>23</sup>

Economic integration provides for a theoretically efficient economy. Provinces that are unconvinced or unwilling to sacrifice other interests to this end are only marginally able to plan their own economies. The provincial unit is simply too small and too interdependent to control its own economic destiny. The poorer provinces feel deeply the impact of structural and cyclical economic problems. Provincial policies designed to strengthen the provincial economy at the expense of neighbouring provinces, beggar-my-neighbour policies, are of limited effect. Secondly, provincial policy suffers significantly from the problems of leakage and spill over. A boost in provincial activity results in an increased level of imports. Every provincial dollar expended to stimulate economic growth in the province results in stimulation to the economy of other provinces or other nations. Thirdly there is a tendency to use transfer payments to finance consumption. This has no long-term benefit on provincial economies. Maxwell and Pestieau argue that in 1977 only 9 percent of total federal transfers to the regions was directed toward development; the bulk went to transfers for income support. This is true of provincial expenditures as well.<sup>24</sup>

Finally, a province that designs policies to promote its own economic strength at the expense of neighbour provinces, even assuming it could do so effectively, runs the risk of retaliation.<sup>25</sup> It is unlikely that a province will be able to design economic policy effectively in a vacuum. Canada is a sufficiently small economic unit to suffer many of the same

problems of specialization and competition on a national level with regard to the international market. The provinces do not have sufficient power to plan their economies in isolation, but they do have enough to sap national policy at the federal level. The conflicting values reflected by nation building and province building result in various direct and subtle impediments to mobility. Some of these are the subject of the next section.

### *Justification of Impediments to Mobility*

There is, of course, justification offered for institutionalized impediments to mobility of persons within the Canadian economic union. The provinces and the various regions are legitimately interested in furthering the objective of economic self-sufficiency. Not surprisingly, they are interested in improving the provincial or regional industrial structure, in advancing social and cultural goals and in designing mechanisms to minimize the impact of cyclical performance. They are interested in control over and diversification of provincial economies. These pressures result in provincial claims to greater autonomy over allocation and distribution of resource rents and of transferred funds. Provinces are equally interested in minimizing losses to provincial populations.

Clearly, there are cultural variations in social and political preferences within provinces. The economic wealth or poverty of a particular province will often result in that province's willingness to engage in greater or lesser trade-offs in attempting to design solutions for issues such as industrial expansion and resulting pollution and with regard to land use issues. Furthermore, large central governments are, at least in theory, better able to experiment and to try new and, it is to be hoped, better ideas as solutions for their particular problems. A regional government can respond to collective preferences respecting which there is often a strong consensus, one unlikely to be present at the national level. Consensus also reduces the costs of decision making. The lack of consensus at the national level is evidenced in the differing responses from the various regions to issues such as language, unemployment and resource revenues. Consensus at the provincial level will often make it easier to obtain agreement of the provincial polity with regard to wealth redistribution issues.

There is also a legitimate provincial interest in controlling those factors that impact on relevance and quality control with regard to entry into the various professions. While this is a legitimate provincial imperative, entrance requirements for access to provincial professions often seem to reflect an economic interest in protecting existing members of professions and trades rather than in assuring reasonable minimum levels of competence.

There is equally a provincial impetus to modernize and diversify the



industrial structure to respond better to market opportunities and to generate wealth and jobs while taking into account the nature of provincial employment and unemployment and differences in standards and cost of living. Provincial government policies may fragment markets and impede personal mobility at a national level because they represent provincial interests. To fail to do so may well result in loss of local effectiveness and even in political defeat. This tendency is exacerbated by the fact that national policies invariably imply regional losers. This compels provincial governments to act in the interests of their own constituency. Barriers serve the provincial purpose of internalizing the benefits of economic growth at the provincial level, of easing adjustments in declining sectors, particularly with regard to labour, and in maximizing benefits to the political fortunes of the provincial government.

Specific justification for various barriers to mobility of services and labour surface in the context of the various impediments described in the next section. The specific justifications for provincial and federal impediments are canvassed in the sections describing those barriers, and the degree to which those rationales justify the impediments in question is considered therein.

## **Mobility and Impediments to Mobility**

In 1982, ten years of constitutional review in Canada resulted in a new Constitution. Entrenched in that Constitution is recognition of mobility rights for all Canadians. That ten-year period witnessed significant review by Canadian law and economics scholars of the inadequacy of pre-Charter legal protection for mobility rights and of the many and various impediments to complete mobility of the factors of production. Scholarship in that period made great strides in identifying some of the many legal and other impediments to full mobility. Ten years of research has hardly completed the list of existing impediments.

Entrenchment of mobility rights in section 6 of the *Canadian Charter of Rights and Freedoms* has made unconstitutional some of the impediments to mobility of labour and services. Several early reported judgments have considered the constitutionality of certain legal requirements and have concluded that some of the previously legitimate impediments have been rendered unconstitutional by section 6. We will look at the strengths and weaknesses of section 6 in the section dealing with legal protection of mobility rights in Canada. We now turn our attention to the degree of mobility in the Canadian population and to a partial catalogue of the more significant existing impediments to mobility of labour and of services. The catalogue of impediments does not purport to be complete or comprehensive. Nor can we closely identify patterns of movement in the population with existing impediments to

mobility. Continuing research will undoubtedly reveal other impediments and focus on their direct impact on population movements. One would hope that in the next several years provincial and federal governments will review legislative and regulatory requirements to revise those impediments that obviously infringe on *Charter* rights.

### *Level of Mobility in the Population — Demographic Studies*

Impediments to mobility are significant in direct proportion to their impact on free movement. A great deal of demographic work has been done to determine patterns of interprovincial migration within Canada. These patterns can be identified. What is more difficult to identify are the reasons for which Canadians choose to move within the country. Economic theory posits that they will do so in order to increase overall economic benefit to themselves and with a corresponding positive effect on national economy.<sup>26</sup> Before turning to a catalogue of impediments, let us examine levels of migration. Existing impediments may then be measured against demographic trends in an attempt to determine a causal connection.

The general trends in interprovincial migration are not entirely surprising. We will review them briefly here. Mobility rates for Canadians are significantly lower than the corresponding rates in the United States, although comparability of patterns of mobility is questionable.<sup>27</sup> U.S. interstate mobility rates are twice the interprovincial mobility rates in Canada. In contrast, mobility from abroad into Canada is two to three times greater than it is in the United States. The significant factors behind interprovincial migration are income level, employment opportunities, the size of the population in the area of future residence, age and the distance involved.<sup>28</sup> The 1981 census showed a 20 percent change in residence over the five-year period. Of these, 15 percent had moved within the province, 5 percent had moved interprovincially and 5 percent had migrated in from another country.<sup>29</sup> These figures are relatively constant.

Between 1976 and 1981 British Columbia and Alberta experienced a net in migration both from within and outside of Canada. A net out-migration of interprovincial migrants resulted in the absolute decline of the population of Saskatchewan and the very small growth of the populations of Quebec and Manitoba. Newfoundland, P.E.I., Nova Scotia and New Brunswick have a net outflow of both international and interprovincial migrants. There is a significant degree of return migration; the level of which was estimated to be approximately 20 percent of interprovincial out-migrants.<sup>30</sup>

Differences in regional population growth can be attributed primarily to migration rather than to differences in birth rates. For this reason, migration is responsible for the redistribution of the Canadian popula-



tion. In-migration has a tendency to increase that part of a province's population that is of working age. Out-migration has the opposite effect. Migrants are young, usually single, and have higher educational levels than non-migrants. The unemployed are more likely to migrate than the employed. Interprovincial migration is more common among low-income and high-income persons than it is for middle-income persons.<sup>31</sup>

More of the unemployed than of the employed actually moved. The duration of unemployment is critical. Persons who experience short periods of unemployment have high mobility rates. As the duration of unemployment lengthens, mobility rates fall.<sup>32</sup> The highest mobility rates are from the Atlantic region, the Prairies and British Columbia. Ontario and Quebec have the lowest levels of mobility. Grant and Vanderkamp found that union members, typically craftspeople and production workers, have low mobility rates, whereas members of professional associations have relatively high rates.<sup>33</sup>

Language, culture and the availability of services all impact on the willingness to migrate. As much attention as possible must be given to reducing the impact of language and culture as impediments whether the value in question is one of increased economic efficiency or of a sense of Canadianism. The impact of language and culture on migration is particularly obvious in the migration figures from Quebec. In the period from 1971 to 1976 net out-migration from Quebec interprovincially was 12.4 percent for the English language group, but only 0.9 percent for the French-speaking group. Net in-migration was 4.5 percent for French speakers, but only 0.4 percent for anglophones.<sup>34</sup> This pattern persisted between 1976 and 1981. A study by Baillargeon calculated that between 1976 and 1981, 17 percent of the English-speaking population of Quebec migrated out while only 1 percent of the French-speaking population migrated.<sup>35</sup> Baillargeon concluded that knowledge of English is a major factor in a decision to leave the Province of Quebec, while ignorance of English acts as a brake on mobility. She concluded that the propensity to emigrate for a unilingual anglophone from the Province of Quebec is 91 times greater than for a unilingual francophone.<sup>36</sup> The absence of a vibrant French language culture outside Quebec is undoubtedly an equally significant brake on francophone migration to the English-speaking provinces.

### *Uniformity v. Portability; Mobility and Language*

Before turning to a catalogue of some of the most significant impediments to mobility, two additional points must be made. The first of these is to distinguish between uniformity of benefits and portability of benefits. The second is to comment briefly on the very significant impact of language use on mobility of persons within the Canadian federation.

It was previously stated that for Canadians to experience true mobility

rights, there must be more than the mere absence of legal barriers to the practice of a trade or profession in another part of the country. To be truly mobile, with all that this implies in the economic and political context, Canadians must have sufficient information to allow them to determine where their services could best be used and must have access to a reasonably comparable level of social services in the new location. A third consideration is the degree to which the potentially mobile citizen is entitled to take rights and benefits from the old province of residence to the new. Here we must distinguish between the principles of uniformity of benefits and portability of benefits. It is insufficient that Canadians are entitled to similar levels of service in their new province of residence. Uniformity is a necessary, but not a sufficient, condition to mobility. Beyond uniformity, Canadians require portability; they must be able to take accrued rights and benefits with them to the province of new residence. The most obvious example of the necessity of portability of rights and benefits arises in the context of pension plans. These will be considered in greater detail below. We may here make the point that access to benefits in the province of new residence identical to those in the province of previous residence would satisfy a requirement of uniformity. However, should the potentially mobile individual be obliged to forfeit accrued benefits upon exit from the province of previous residence, that forfeiture would constitute an impediment to the exercise of mobility rights. The degree of impediment in any individual case would presumably be measured in direct proportion to the value of the accrued benefits to be abandoned.

The second common theme that we must bear in mind when we examine impediments to mobility is that of language and culture. The predominant impact of these factors is upon those who would migrate to or from the Province of Quebec. We spoke previously of non-economic values that impact on provincial and federal attitudes toward mobility. The demographic studies discussed above indicate the degree to which language and culture impact on levels of in- and out-migration between provinces. Uniformity of benefits and social services cannot be legitimately measured unless availability of those services in the language of choice is a viable option.

### ***Impediments and Disincentives to Mobility: Federal and Provincial***

#### **SOCIAL SERVICES**

##### ***Health Care***

To ensure the right of all Canadians to move to and take up residence in any province of Canada, social services must be equally available in the province of new residence. Lack of availability of, or delay in access to,



social services, acts as a serious brake on the exercise of mobility rights. Of greatest importance are those programs that provide income support and health care services. Among the most important of the former we include provisions for unemployment insurance, for welfare, for age-related security benefits and for premium assistance in obtaining health care. A brief review of the requirements for eligibility and portability under the governing acts will indicate the extent to which these programs limit mobility.

Income support, unemployment insurance and universal health care each constitute a domain in which either there has been a constitutional amendment so that the provisions can be made at the federal level (unemployment insurance) or the federal government, through co-payment mechanisms, has entered a provincial field and has placed terms and conditions on the ability of the provincial government to expend funds. All serve as good examples of the kinds of legislative structures that create tensions of the nature described in the previous section.

The new *Canada Health Act*,<sup>37</sup> replacing the *Hospital Insurance and Diagnostic Services Act*<sup>38</sup> and the *Medical Care Act*,<sup>39</sup> provides federal cost sharing for the cost of medical care. Provinces must meet the various conditions for transfer payments set out in that act. Two of the fundamental principles of the *Canada Health Act* impact positively on the principle of mobility. To qualify for federal funding, provincial health care systems must provide full portability of benefits and full accessibility to benefits for residents of the province. The act allows a maximum residency requirement of three months.<sup>40</sup> A resident is defined by the act as “. . . a person lawfully entitled to be or to remain in Canada who makes his home and is ordinarily present in the province . . . .”<sup>41</sup> Failure to comply with these requirements results in disentitlement to funding. The provisions of the act dealing with the cost of medical services incurred while temporarily out of the province of residence have been significantly improved. Prior to the passage of Bill C-3, residents of a province who incurred medical expenses in another province were entitled to reimbursement levels equal to those of the home province. These provisions have been tightened to provide for reimbursement at the rate scale of the province in which the services are received. While the previous provisions were not a significant impediment to interprovincial mobility, the current provisions are preferable. They provide that Canadians who find themselves ill while temporarily in another province cannot be financially penalized.

It is occasionally necessary for the residents of one province to receive medical services in another province because those services are unavailable in the home province or because out-of-province services are geographically more accessible. The provisions of Bill C-3 enhance the ability to receive medical services in whatever province is most

appropriate. This has a positive impact on our sense of being citizens of one nation. Further, where a period of residence is required by the province of new residence, an obligation is imposed on the province of previous residence to provide for payment for medical services incurred during the waiting period.<sup>42</sup> Access to health care is assured by relative uniformity from province to province, combined with interprovincial portability. At the federal level, there are no impediments to mobility.

There are severe residency requirements in some of the supplemental provincial programs. By way of example only, Ontario's premium assistance program for low-income individuals requires a 12-month residency.<sup>43</sup> Drug benefits for senior citizens are also subject to a 12-month residency requirement.<sup>44</sup> The 12-month residency requirement for the Ontario Health Insurance Plan (OHIP premium assistance is particularly disturbing because Ontario is one of the few provinces that still utilizes the regressive mechanism of payment by premium rather than through the tax rolls. Nothing in the new *Canada Health Act* impacts on the right of the province to continue to use a premium-based scheme, rather than a revenue-based scheme.

### *Income Assistance*

The *Canada Assistance Plan*<sup>45</sup> provides federal financing on a cost-sharing basis for provincial income assistance and welfare programs. As a condition of receiving federal funds the province must enter into an agreement which provides that it will not require a period of residence as a condition of eligibility or for the receipt or continued receipt of financial aid or other assistance.<sup>46</sup> This provision forbids durational, but not simple, residence requirements.

Federal legislation does not provide a uniform definition of residence. As a result there are differences in provincial definitions. The Province of Saskatchewan defines residence as physical presence in the province.<sup>47</sup> Other provinces do not provide statutory definitions. The act does not speak to the problem of municipal residence requirements. Other forms of provincial income assistance include severe residence requirements and these appear at the provincial level for social benefits such as access to public housing, discretionary income supplements and tax credits. By way of example only, the *Ontario Pensioners Property Tax Assistance Act*<sup>48</sup> requires that an "eligible person" be ordinarily resident in Ontario, have resided in Canada for ten years and in Ontario for one year prior to application, or have an aggregate period of residence in the province of at least twenty years.<sup>49</sup> The *Ontario Guaranteed Annual Income Act*<sup>50</sup> defines an "eligible person" as one actually residing in Ontario, who has resided in Canada for ten years immediately preceding the date on which application is approved, and who has resided in Ontario for a period of one full year immediately prior to the date on which the application is



approved. (There are rules pertaining to aggregates where these requirements cannot be met. Nonetheless the aggregates are the equivalent of the ten-year residency requirement.)<sup>51</sup> These are offered by way of example only. They constitute significant impediments to mobility. It is hard to justify such severe residency requirements on any grounds.

Trebilcock, Kaiser and Prichard<sup>52</sup> argue that the *Unemployment Insurance Act* restricts labour mobility as a result of administrative policy. They argue that the requirement that the individual be available for work is used to refuse benefits to those who move from urban to rural areas, regardless of actual employment possibilities. Administration of the act includes a built-in disincentive to regional mobility, contrary to the act's intention. In an area of clear federal authority, one wonders why portability is not required as a condition of funding.

## PENSION BENEFITS

Scholars have noted that pensions in Canada have a significant negative impact on mobility both within and between provinces. Lack of portability of pension plans is one of the most significant impediments to mobility. In 1980, 14,500 employer-sponsored private plans covered 4.5 million persons in the public and private sectors. There are two public pension plans operative in Canada: the Canada Pension Plan and the Quebec Pension Plan. Jurisdiction over pensions is provided for by section 94A, an amendment to the *Constitution Act, 1867*. That section provides that the federal government of Canada has jurisdiction in relation to old age pensions and supplementary benefits, but only to the extent that any such legislation does not affect the operation of provincial legislation in the field. Portability of Canada's two public pension plans creates no difficulty.

There are two serious problems with portability of private pension plans. These problems arise in the context of vesting of employer contributions to the plan and in the context of locking-in of employer and employee contributions on vesting. These problems arise intra provincially, as well as inter provincially, and are within provincial constitutional jurisdiction. Generally, an employee's interest in a private pension plan cannot be transferred from one employer to another. Difficulties arise where the employee contemplates leaving employment to move to a new employer within the province or within Canada. Upon termination of employment, an employee will lose the employer's contribution to the pension plan and will be entitled only to his own contributions where vesting has not occurred. Where the benefits have vested, the employee will be entitled to both employee and employer contributions but will most often be unable to receive the funds in a cash settlement and will be obliged to take the accrued benefits in a deferred pension.

The requirements with regard to vesting of the employer's contribution vary from province to province. Only six provinces have enacted pension benefits legislation establishing minimum standards in key areas including vesting, indexing, survivors' benefits and disclosures to employees of information regarding the plan. Four provinces, British Columbia, New Brunswick, Prince Edward Island and Newfoundland, have no such legislation.

The minimum vesting rules require unnecessarily long periods of employment. Most provinces provide that a plan must vest once the employee has reached age 45 and has worked for the employer for a ten-year period.<sup>53</sup> Saskatchewan requires that the plan vest after one year of employment if the sum of the employee's age and his years of service equal 45.<sup>54</sup> Manitoba requires ten years of employment; there is no age requirement.<sup>55</sup> The only argument in favour of lengthy vesting periods or, for that matter, of any durational requirement with regard to vesting, is that such requirements minimize the likelihood that the employee will take early termination of employment. Where the employee leaves the employer there is a negative impact as the employer has expended resources on the training of the employee. The lock-in effect of provincial legislation on vested pension rights denies the employee a lump sum payment but grants deferred pension benefits. Many private plans do contain vesting provisions which are superior to those provided by statute: five percent of employer-sponsored pension plan members receive immediate vesting; 62 percent vest after 10 years or less; 14 percent vest as contemplated by provincial legislation.<sup>56</sup> Only three-tenths of one percent belong to plans which contain no vesting provisions whatsoever.<sup>57</sup>

Complete portability requires transferability from employer to employer and private reciprocal arrangements do exist. The report of the parliamentary task force on pension reform<sup>58</sup> recommended the establishment of a registered pension account analogous to existing Registered Retirement Savings Plans (RRSPs). Such plans would be fully portable. The task force also recommended a reduction of the vesting period to two years of employment.<sup>59</sup> Jurisdictional difficulties in implementing pension reform should not be overlooked. Section 94A of the *Constitution Act, 1867* grants jurisdiction to the federal government only to the extent that federal legislation does not affect the operation of provincial legislation in the field. Full cooperation between federal and provincial governments and private employers will be required.<sup>60</sup>

A detailed study of the parameters of pension law reform is outside the scope of this study. What is clear is that the inability to carry paid-in pension benefits to the new employer, whether intra- or inter provincially, constitutes a significant impediment to personal mobility for Canadians.



## EDUCATION

### *Fee Structures*

Canadian students are provided with primary and secondary education in their place of residence, but once they reach university age, they are sufficiently independent that they may receive their education anywhere within or outside of Canada. The same is true of postgraduate education. Are there impediments to mobility of students at the level of entrance to university? This question must be asked both in the context of impediments to admission and at the level of access to federal and provincial scholarships, fellowships and bursaries.

There are impediments to full mobility for students interprovincially. The Report of the Federal-Provincial Task Force on Student Assistance<sup>61</sup> concluded that there are no significant barriers to interprovincial mobility of students. "Significance" is relative. Barriers do exist, and they are unjustified.

At the present time no distinction is made between in-province and out-of-province students at the level of fee structure. However, the Province of Quebec recently announced, and then renounced, an intention to initiate higher fees for out-of-province students.<sup>62</sup> The fee differential was reported to have been a \$450 fee for Quebec students against a \$1,000 fee for out-of-province students.

Quebec is apparently prepared to waive the additional fee for out-of-province francophone students if the province of residence has entered into a reciprocal provincial agreement. The reciprocal agreement for waiver of additional fees would be available only to francophone students from outside Quebec. The province argues that the discriminatory fee charged to out-of-province students is no greater than the students would be required to pay in their home province. Reports indicate that while 4,500 students from outside Quebec study at the province's universities, 9,000 Quebec students study elsewhere in Canada. (It is not clear whether the first figure refers only to Canadian students studying in Quebec.)

Such a differential fee system is a clear impediment to mobility. The scheme proposed by Quebec is complicated by its reference to language. Francophone students, upon agreement between provinces, may be exempted from the increased fee. Thus, the plan constitutes theoretically a greater impediment to the mobility of anglophones into the province than to francophones. Furthermore, the suggested plan is ripe for retaliatory measures by other provinces. Mr. Terrence Donahoe, chairman of the Council of Ministers of Education of Canada, was reported as stating that it would be extremely unlikely that any province would sign such a reciprocal agreement. He argued that a province would be hard pressed to enter into a reciprocal agreement for the benefit

of its francophone students to the exclusion of anglophone students. New Brunswick has a reciprocal arrangement with the Province of Quebec for the purposes of reserving places for New Brunswick students in the professional faculties of Quebec. However, these agreements do not involve preferential fee schedules.

Canadians have traditionally attended the university closest to parental residence. Policies that create additional impediments to the mobility of Canadian students are regrettable and policies that limit contact between the anglophone and francophone populations of Canada are parochial at best. Removal of these barriers requires a concerted effort at both the federal and provincial levels.

### *Admission Policies*

Several provinces have adopted discriminatory policies at the level of admission. British Columbia has a general admission policy restriction which provides that all qualified provincial residents must be accepted by postsecondary educational institutions before out-of-province students will be considered for admission. Other provinces provide for out-of-province restrictions or quotas in the context of specific programs. Admission to medical schools is most stringently regulated. Medical schools in Canada show an explicit preference for provincial residents, with only a limited number of positions available to non-residents.<sup>63</sup> Two universities even restrict admission to provincial residents. The University of Western Ontario requires "special circumstances" before it will admit out-of-province residents. Two universities have no stated policy. Only Queen's University specifically states that province of residence is not taken into account in admission to the medical faculty. Other professional faculties have similar restrictions on out-of-province entrance.

### *Financial Assistance*

Impediments to mobility also exist at the level of federal and provincial funding for studies. Student assistance is funded at both the federal and provincial levels. The federal Canada Student Loan program (CSLP) provides for portability within and outside Canada, when approved by provincial authorities. Most provinces place restrictions on portability for undergraduate study outside of the province with regard to provincial funds, but approve out-of-province study for the CSLP. Most provinces permit portability of provincial funding whenever a program is not available in the home province, and most permit full portability for graduate studies.<sup>64</sup> The limits imposed on provincial grants for students studying outside the province are an impediment to mobility. The task force on student assistance concluded that these restrictions were understandable in the current economic climate, as the province of residence would be providing aid to fill space in postsecondary institutions in other provinces and would be contributing to the training of



qualified manpower for other provinces.<sup>65</sup> It also concluded that such impediments are acceptable.

There is a high degree of mobility among postsecondary and graduate students. A 1974–75 survey found that 44 percent of all postsecondary students were studying outside their home province; 47 percent of full-time graduate students were studying in the home province and, of these, 20 percent of full-time graduate students and 25 percent of undergraduate students intended to locate elsewhere. This cuts against the argument that provinces are justified in limiting portability to avoid training qualified manpower for other provinces. The task force concluded that between five and nine percent of the postsecondary population had studied in more than one province or outside Canada. These students had managed to finance their studies but may have done so by relying on a higher proportion of loans than had students studying in their home provinces. They may also have come from higher-income families. The task force concluded: “students who decide to study in other provinces or abroad should not be denied the opportunity to do so because of lack of finance. . . . [T]he provisions of aid programs should not, in themselves, be factors in encouraging mobility when equivalent education is available locally.”<sup>66</sup>

The student aid program does discourage mobility, particularly at the undergraduate level. As a general rule grants are available to undergraduates studying outside the province of residence only if provincial courses are unavailable; however, loan provisions are still available. These impediments, while perhaps minor, are unnecessary and ineffective in achieving provincial objectives. A significant proportion of funding for secondary education is provided at the national level. It would be appropriate to attempt to specify the economic impact of providing full portability for all Canadian students interprovincially. Impediments to mobility ought not to be acceptable.

Finally, it appears that the various provincial programs providing for student assistance are sufficiently open-ended for students resident in Canada to qualify for assistance under the terms of one of the provincial plans, without encountering significant impediments based on residency requirements.

## TRADES AND PROFESSIONS

Impediments to mobility impact on trades and professions at entry levels and in the context of preferential hiring policies. These impediments have been the subject of extensive study. The attention focussed on some of them has resulted in improved provincial legislative provisions governing entry.<sup>67</sup> In the context of preferential hiring policies there has been little improvement. Within limits, preferential hiring policies have

been constitutionalized by section 6 of the *Canadian Charter of Rights and Freedoms*.

### *Entry*

The process of entry into the various trades is complex. There are inadequate provisions for provincial uniformity. In the absence of uniform entry requirements, provincial policies constitute an impediment to mobility of labour. Uniformity of entrance requirements or reciprocal recognition of entry requirements would improve this situation.

The Department of Employment and Immigration sponsors a voluntary program designed to provide for reciprocal recognition of qualification in trades interprovincially. The Interprovincial Seal Program provides for the issuing of a Red Seal to those who have passed an Interprovincial Standards Examination and it amounts to national certification. The total number of seals outstanding at year end 1980 was 106,126. These were issued to some 22 trades. This program is a significant improvement to provincial mobility of trades, but it does not provide for cross-Canada credits for apprenticeship programs.

The level of provincial tradespeople holding interprovincial seals varies greatly from province to province.<sup>68</sup> Trebilcock et al. report that there is a significantly lower level of participation in the program by trades in Quebec. They attribute this to a lack of publicity for the program, a less well-structured apprenticeship program and a system of compulsory certification in Quebec. This degree of impediment to mobility ought not to exist.

Safarian points out that 31 percent of all craftspeople in production-process occupations and 25 percent of all sales occupations are subject to licensing in Canada.<sup>69</sup> Trebilcock et al. point out that 33 occupations in the Province of Ontario are subject to provincial licensing requirements.<sup>70</sup> There should be no difficulty in recognizing out-of-province training programs where training or apprenticeship is taken in Canada. Reciprocity of standards and portability of certification or licensing should be the norm. The potential negative impact on mobility is significant.

### *Preferential Hiring Practices*

Mobility of labour is further complicated by preferential hiring practices at both federal and provincial levels. These preferential practices impact on trades and professions. Their most significant impact is on the skilled trades. Preferential practices are particularly associated with megaprojects in the resource area.

In *Securing the Canadian Economic Union in the Constitution*<sup>71</sup> the Honourable Jean Chrétien lists four situations in which federal policies favour preferential hiring practices. The broadest in scope arises under the federal *Public Service Employment Act*<sup>72</sup> wherein section 19 requires



that the Public Service Commission, when making a new appointment to the civil service, give preference to the appointment of those qualified candidates who are residents of the area to be served.

The *Regional Development Incentives Act*<sup>73</sup> provides that where the Department of Regional Economic Expansion grants financial incentives to an industry under the act, the industry:

[S]hall undertake to train and employ to the maximum extent practicable persons who are residents, at the time the application for an incentive was made, of the designated region . . . .

Subsidiary agreements under the general development agreements with the provinces also contain local hiring provisions. Chrétien cites the Manitoba Northlands Agreement that “it is agreed that in order to be of direct benefit to Northerners, all construction contracts let under this agreement shall contain northern employment preference provisions.” “Northern resident” is defined with reference to location, and the residency requirement is simple, not durational.

Narrower in scope, but with an equally negative impact on mobility, is legislation with regard to specific projects, such as the *Northern Pipeline Act*.<sup>74</sup> That act requires the foothills pipelines companies to provide manpower plans acceptable to the Minister of State for Economic Development. The plans must provide for affirmative action initiatives for the employment of women, natives and local residents.

Identical provisions are found in provincial legislation. Both Quebec and Nova Scotia provide for preferential recruitment of local residents to the provincial public service.<sup>75</sup> Preferential hiring policies can be found in the *Petroleum and Natural Gas Act* of the Province of Newfoundland.<sup>76</sup> The regulations provide for preferential purchasing policies with regard to goods and services and that certain sums be expended in education and training of residents of the province and for research and development in the province. Preference for local labour and services is specified. The regulations provide that “. . . a permittee or lessee shall give preference in his hiring practices to qualified persons normally resident in the province . . . .”<sup>77</sup> The operative definition for residence is residence in Newfoundland for three years prior to 1978 or for a period of ten years at any time. These regulations are a clear impediment to mobility of labour and also constitute discriminatory treatment of those who are relative newcomers to the province.

Nova Scotia has passed similar legislation,<sup>78</sup> but the act has not been proclaimed. Subsection 13(2) of the act provides that “the Minister may specify provisions for the use of Nova Scotian labour, goods and services and commitments to encourage Nova Scotia education and training, research and development.” Clause 26(1)(s) provides that “the Governor in Council may make regulations respecting the nature and

extent of employment of Nova Scotians by holders of petroleum rights and others performing work authorized by a petroleum right.”

In Saskatchewan, the Department of Northern Development requires that lease agreements with resource development firms seeking licences provide a northern preference hiring clause. The clause requires that 50 percent of staff be northern residents. The definition of northern resident requires that the individual have lived in northern Saskatchewan for 15 years, at any time. Alberta policy provides that wherever practicable, Alberta engineering and other professional services, as well as Alberta tradespeople and other construction personnel, materials and supplies be used.<sup>79</sup>

It should be noted that long residency requirements to qualify for preferential hiring practices may be misleading. While they discriminate against non-residents or shorter-term residents, their impact may be to draw the class of residents entitled to preferential treatment so narrowly as to limit the resident entitlement as well.

One of the most notorious provincial impediments to mobility of labour is Quebec’s provisions for construction industry workers. These provisions not only impact negatively on intraprovincial mobility of labour but constitute a total impediment to extraprovincial residents finding employment in construction in Quebec. The act provides for a series of classification certificates which are issued based on the number of hours worked and domicile in the relevant region. The requirement of domicile effectively excludes non-residents of the province.<sup>80</sup>

These regulations impact primarily on residents of Ontario who live along the border between the two provinces. The Ontario Ministry of Industry and Tourism estimates that some 3,000 eastern Ontario workers have been excluded from work in Quebec by this legislation.<sup>81</sup> In retaliation, the government of Ontario introduced legislation to restrict Quebec workers from entering Ontario. The Ontario legislation proceeded to second reading and was allowed to die on the order paper. Charges brought against a certain Gerald Larochelle for failure to comply with the Quebec regulation were upheld by the Quebec Court of Appeal.<sup>82</sup>

Preferential hiring policies impede mobility of Canadians to employment opportunities in provinces other than that of their principal residence. Their proliferation has slowed with the slowing of megaprojects in the natural resource sector, but a significant level of impediments remains. Studies of the actual economic impact of such policies are imperative. We cannot assume benefit to either local populations or to the local economy. In the absence of clear economic benefits, federal and provincial governments should remove all such impediments.

### *Impediments to Portability of Professional Qualifications*

Impediments to portability of professional qualifications exist at two



levels. The first of these is at level of entry into the profession. The provinces recognize each others' professional degrees at this level. Nationwide licensing exams are available in medicine.

There are differing mechanisms for recognition of non-Canadian qualifications for entry into the professions in Canada. Professional qualifications are governed by the provinces, but there are discrepancies in requirements and in reciprocal recognition of foreign degrees from province to province. Mobility of professionals was studied in detail by Ellen Murray in two studies prepared for the Professional Organizations Committee, Ministry of the Attorney General, Province of Ontario.<sup>83</sup> She concluded that for Canadian-trained accountants, architects and engineers, mobility is extremely high. This is also the case for Canadian-trained physicians. Canadian-trained entry level lawyers are fully mobile unless trained in Quebec. Despite the findings of the studies prepared for the Professional Organizations Committee, a study prepared for Statistics Canada by Muzondo and Pazderka concluded that impediments to mobility for professionals in Canada cost Canadian consumers more than \$50 million in 1970 alone.<sup>84</sup>

Impediments to entry of and mobility for foreign professionals are most significant. New Brunswick, Prince Edward Island, Ontario, Manitoba, Alberta and British Columbia require foreign-trained medical practitioners to be in receipt of a certificate from the Medical Council of Canada. That council requires foreign medical graduates to pass Medical Council exams and often to re-do a period of internship. Exceptions are made where the province has a reciprocity agreement with the United Kingdom. Not all provinces do. Thus entry into one province may be accomplished but mobility within Canada will not follow. Quebec requires one year of residence in the province prior to admission to the practice of medicine.

Admission of foreign graduates to the practice of law in Canada is subject to scrutiny by the Foreign Accreditation Committee of the Federation of Canadian Law Societies. That committee recommends the extent to which foreign credentials should be granted recognition and the nature of re-training required before the candidate may seek admission to a bar of one of the provinces. Full recognition for foreign degrees or experience in practice is exceptional. Voluntary national criteria such as these are encouraging.

Several interesting developments have recently occurred relating to entry into the practice of medicine. In each case the provisions and suggested provisions impact on mobility of medical practitioners both inter- and intraprovincially. These developments are in response to several factors. First, geographic maldistribution of physicians has led the provinces of Quebec and British Columbia to design mechanisms to encourage medical practitioners to locate their practices in the rural, underserved areas of the province. It is recognized that urban popula-

tions are overserviced by medical practitioners while rural populations often have an unacceptably low level of medical service available to them.

There are obvious incentives for a medical practitioner to settle in an urban area: the amenities of city life, the possibility of specialization, the access to colleagues, continuing education and sophisticated institutional facilities. Income levels are higher for urban professionals. In urban areas the profession may begin to feel that the oversupply of physicians is impacting negatively on income levels. This concern may be mirrored in the provincial governments, where it may be perceived that physician income levels, reduced by physician oversupply, will be maintained by overservicing of patients.

With the *Health Insurance Act* of 1982, Quebec has responded specifically to the issue of location of new physicians in the province. To prompt physicians to spend the earliest years of practice in underserved locations, Quebec offers a reduced fee schedule to new physicians who locate in designated urban areas of the province; those who locate in rural areas receive 100 percent of fees; those in urban areas only 70 percent. This provides a financial incentive to settle in areas suffering from a shortage of qualified physicians, but the differential fee schedule applies only in the first three years of practice.<sup>85</sup> The scheme is reported to be only marginally successful and applies equally to medical practitioners who have received their training outside the province and to those who are non-residents of the province at the date of application for a billing number. The act gives authority to the government to provide for differential fee scales in territories which are underserved, and for different levels of remuneration during the first years of practice.<sup>86</sup> At this time only general practitioners and specialists in the first three years of practice are affected.

The plan contemplated by British Columbia is more onerous in its implications. The British Columbia provisions are in the form of a draft bill which has not yet been implemented. Bill 24<sup>87</sup> provides that the Medical Services Commission be given the additional responsibility of granting or refusing a provincial billing number to new practitioners. It allows the commission to impose conditions on the use of the billing number. A physician refused a billing number is entitled to practise medicine but is not entitled to receive reimbursement from the provincial plan. He is obliged to notify patients that he does not have a billing number or is practising outside the conditions attached to his billing number. The patient is personally responsible for the physician's fee. No liability is incurred by the patient where he has not first agreed to pay for services rendered.<sup>88</sup> While this legislation has not yet been passed, the policy of refusing billing numbers is already in place. There is some possibility that out-of-province applicants are those most likely to be refused billing numbers, although Bill 24 does not specify such a policy.



These impediments to mobility are of concern to the Canadian Association of Interns & Residents and to the Fédération des médecins résidents du Québec. These organizations introduced an amendment to the new *Canada Health Act* to ensure the right of all physicians to practise within the medical care system and to be assigned a billing number. The proposed amendment would have appeared in section 12 of the act as part of the definition of accessibility and would have provided that:

- 12(1) In order to satisfy the criterion respecting accessibility, the health care insurance plan of a province
- (d) must provide every duly qualified medical practitioner . . . who has been licensed by the province to practise in the province, with the right to provide, and to continue to provide, insured health services, anywhere in the province and such rights shall be extended to all duly qualified medical practitioners . . . on equal terms and without discrimination.

The amendment was defeated five to four.

Other provinces deal with the problem of maldistribution of medical personnel by the use of incentives to physicians to spend time in remote rural areas. The British Columbia plans impact on intra- and interprovincial mobility. At the administrative level in British Columbia, extraprovincial applicants apparently are being treated differently. Differential fee scales and the refusal to issue a billing number, or the imposition of conditions on billing numbers, impact on mobility of physicians.<sup>89</sup>

### *Miscellany*

A miscellany of residency requirements bars entry into professions in the various provinces. Some are simple and sensible; some complex and incomprehensible. It would be impossible to identify all such impediments to mobility; our best hope is that each province reviews its own acts and regulations to identify impediments that are unnecessary. By way of example only, a review of the statutes and regulations of the provinces of Ontario and British Columbia was made which revealed a hodgepodge of residence requirements, preferential treatment of British subjects and Canadian citizens and the occasional apparent prohibition on entry of individuals trained outside the province.

Many acts require either Canadian citizenship or the status of a permanent resident for entry into the professions. These are hardly objectionable.<sup>90</sup> There is no such requirement for others.<sup>91</sup> The British Columbia *Public Service Act*<sup>92</sup> gives preferential hiring treatment to Canadian citizens. There is the occasional strange reference to a requirement of domicile, rather than residence.<sup>93</sup> Several statutes require an applicant for licence or registration to be resident in the province.<sup>94</sup> The British Columbia *Accountants (Certified General) Act* requires residency before an applicant is entitled to take the required examination.<sup>95</sup> The

*Psychologists Act*<sup>96</sup> and the *Engineers Act*<sup>97</sup> of British Columbia require either actual or intended residence in the province.

Certain acts require irrationally long residence requirements prior to qualification for licensing. Among the strangest we may include the *Wild Rice Harvesting Act*<sup>98</sup>, which requires a 12-month residence in Ontario to qualify for a licence, the British Columbia *Architects (Landscape) Act*<sup>99</sup>, which requires a one-year residency before application for a licence and the same province's *Notaries Act*<sup>100</sup>, which requires a three-year residency prior to application for licensing.

Other acts provide for a *discretion* to refuse registration to non-residents of a province or of Canada.<sup>101</sup>

Finally, in two cases identified, there is either outright discrimination against out-of-province qualifications or an apparent refusal to recognize them at all. The *Operating Engineers Act*<sup>102</sup> provides that a provisional certificate may be granted to someone with qualifications from another province and that this shall be at one grade lower than would be the case had the qualifications been received in Ontario. The *Dental Technicians Act*<sup>103</sup> refuses to recognize qualifications other than a period of four years' apprenticeship in Ontario or the successful completion of an approved program in dental technology at a college in Ontario.

## LANGUAGE AND MOBILITY

### *Language and Work*

Canadian commentators have noted the pervasive impact of language on mobility. Language governs the ability of the individual to move to a new province and impacts on his ability to feel comfortable in his province of new residence. Ability to speak the majority language affects mobility and, specifically, the right to work. The degree to which language fluency is a part of one's economic patrimony has become evident in the context of change in language policy of the Province of Quebec.

**Quebec** Language ability impacts on entry into a trade or profession. The Province of Quebec has imposed strict requirements on the language of the workplace and on testing of language ability for access to various professions. Quebec's approach is perhaps the best known and it is certainly the most systematic.

The importance of the connection between language and economic mobility is clear in the context of the decision of the government of Quebec to proceed to Bill 101 and the regulations thereunder. Bill 101 was not designed only to place an economic bonus on the ability to speak French, nor are the language proficiency examinations imposed by the regulations under Bill 101 designed specifically to exclude unilingual anglophones from the marketplace. Nonetheless, the economic implications of francization of the workplace have been apparent in the recent



history of the language of work in Quebec. The negative impact of the exclusion of unilingual anglophones from the Quebec marketplace has equally been noted. As Dominique Clift has pointed out, an insistence on unilingualism gives an economic value to one language and withholds it from the other. This is true of language requirements, whether explicit or implicit, in the legislation of any of the provinces.<sup>104</sup> The reform of Quebec's social institutions in the years following 1960, particularly in the field of education, created a highly skilled francophone labour force in Quebec. This labour force proceeded first to fill all public and parapublic services. After those positions were fully staffed, this highly skilled francophone group had, of necessity, to proceed to seek employment in less traditional positions and this required employment in the private sector. A study published by the *Montreal Star* in 1976 found that 36.2 percent of the city's English unilinguals were concentrated in managerial and professional occupations. Of the city's bilinguals, only 20.7 percent were in those occupational categories. Of French unilinguals, only 12.4 percent were in these categories. The Quebec government concentrated its efforts on promoting the economic power of the French language and both bills 22 and 101 served this purpose<sup>105</sup>, at least in part.

Francization of the workplace is seen as a means of providing Quebecers with the socio-economic means of integrating into the Canadian economic mainstream. It is a provincial affirmative action program. Francization of the private sector has been described as ". . . a program of social advancement and planned social change to ensure equality of opportunity between Francophones and Anglophones working in the business sector in Quebec."<sup>106</sup> The other side of this particular linguistic coin is that the language requirements of Bill 101 impede mobility of unilingual anglophones into the province.<sup>107</sup>

The realization by anglophone Canadians of the economic benefits of bilingualism, particularly in the context of the bilingualization of the federal public service, accounts for the extraordinary growth of French immersion education in this country. This growth may be characterized as a voluntary response to language barriers. There is no doubt that one impetus for parental education is to foster the cultural interchange and understanding between the two language groups. However, one suspects that the economic benefit to be gained by fluency in the two languages is of the greatest significance in a parental decision to enrol a small child in a French immersion program. Growth of such programs has been phenomenal. French immersion education dates back only to 1970 and the increase in enrolment from 1976–77 to 1977–78 was 13 percent; kindergarten enrolment increased 16 percent with a 65 percent increase in British Columbia. There was an overall elementary school increase of 10 percent. If one then moves to the 1982–83 Statistics Canada figures, enrolment increase over 1981–82 was 15 percent.

The number of schools offering French immersion programs has

increased dramatically. From 1981–82 to 1982–83 there was an increase of 118 schools. The total number of schools offering French immersion programs in that year was 662. In 1982–83, 89,000 students were enrolled in French immersion programs from kindergarten to grade 13. The bulk of students are still concentrated in the early years. Not only is a new group entering every year, but each year the size of the entering group grows. The first year in which all provinces provided immersion programs throughout the elementary grades was 1981–82. There is virtually no English language immersion education available in Quebec, but it is possible for a francophone to go to an anglophone school board.

**The other provinces** What is perhaps less well known is that the various other provinces also have both explicit and implicit language requirements that impact on the ability to work and on access to the trades and professions. Once again, a review of the provinces of Ontario and British Columbia was made in an attempt to determine the prevalence of language requirements, both implicit and explicit. Ontario and British Columbia are both relatively unilingual. Ontario is geographically closer to Quebec, has a large franco-Ontarian population and a strong record of expansion of French language rights in the province. British Columbia has a relatively small franco-B.C. population and within Canada, is geographically situated at the greatest possible distance from the Province of Quebec.

A review of the statutes of Ontario and British Columbia reveals that provincial legislation contains both explicit and implicit requirements for English fluency for an individual to participate in the workplace. Both provinces have specific statutory requirements that individuals in certain job categories speak English. In Ontario, ambulance driver/attendants,<sup>108</sup> certain mine workers and construction site workers<sup>109</sup> must speak English. British Columbia has similar language requirements for mine workers.<sup>110</sup> British Columbia also requires that an applicant for a certificate of competency under the *Power Engineers and Boiler and Pressure Vessel Safety Act*,<sup>111</sup> and most applicants for security employee licences under the *Private Investigators and Security Agencies Act*<sup>112</sup> speak English. Perhaps these statutory requirements can be justified on health and safety grounds. Inability to communicate quickly and effectively could result in injury or loss of life. Even so, it is more likely that language flexibility could be tolerated. Reference should be made to the actual location of the employment, the language group in the geographic area and the extent to which the employee would be working in tandem with English-speaking co-workers whose English language proficiency might satisfy the requirements of safety and efficiency.

British Columbia has certain language competency requirements for professionals which are not easily justified. There is a statutory requirement of fluency in the English language for doctors,<sup>113</sup> pharmacists,<sup>114</sup>



veterinarians<sup>115</sup> and practical nurses.<sup>116</sup> These standards appear to have been imposed haphazardly, as there is no similar requirement for dentists or for registered nurses. The only British Columbia provision to recognize the equal acceptability of English and French appears in regulations made under the *Hearing Aid Act*.<sup>117</sup> By way of contrast, the Ontario *Health Disciplines Act* regulations governing dentistry, medicine, nursing, optometry and pharmacy stipulate that these professionals be fluent in either English or French.<sup>118</sup> Regulations made under two other Ontario acts, the *Radiological Technicians Act*<sup>119</sup> and the *Denture Therapists Act*,<sup>120</sup> contains similar requirements. Language requirements ought not to appear at the legislative level but rather at the level of employment, and only where justified and only in a non-discriminatory fashion.

British Columbia also has legislation requiring that certain records be kept in English. The *Employment Standards Act* provides that records regarding employees' wages and holidays must be kept in English.<sup>121</sup> The same act requires employment agencies to keep records in English concerning potential employers and employees.<sup>122</sup> There seems no justification for such a requirement beyond the unacceptable justification of administrative convenience.

### *Language and Services*

In addition to explicit statutory requirements concerning language, implicit requirements are often created by the educational standards imposed on individuals who wish to practise certain trades and professions. In Ontario, an examination must be written before one may be licensed as a mortgage broker,<sup>123</sup> collection agent<sup>124</sup> or funeral director.<sup>125</sup> Other legislation, including the *Nursing Homes Act*,<sup>126</sup> the *Real Estate and Business Brokers Act*<sup>127</sup> and the *Securities Act*<sup>128</sup>, requires that an applicant must take a course and write an examination before he or she can be registered. Some Ontario statutes provide that continuing education courses must be taken to maintain registration.<sup>129</sup> In British Columbia, an applicant must take an examination before being licensed under the *Real Estate Act*,<sup>130</sup> the *Notaries Act*,<sup>131</sup> the *Mortgage Brokers Act*<sup>132</sup> and the *Pesticide Act*.<sup>133</sup> Many professionals are also required to write licensing examinations before being licensed by their governing bodies.<sup>134</sup> Not every examination or course is available in French. The licensing examination for dentists in British Columbia is available in French. In general, nation-wide examinations such as those taken by chartered accountants are available in French. So are those offered by national associations such as the Canadian Securities Institute, even though the examinations may vary somewhat from province to province. However, in most cases the examinations and courses simply are not available in French.

In Ontario, most trade licensing falls within the jurisdiction of the

Ministry of Consumer and Commercial Relations. The ministry is aware of the problem and is considering ways to make the required courses and examinations available in French. In British Columbia, the courses and examinations are generally unavailable in French. There is no present intention of changing this policy as there is little demand, but until these courses and examinations do become available in French, unilingual francophones are effectively precluded from obtaining registration to work in these fields in either province. The small francophone community in British Columbia and the larger one in Ontario are potentially limited in access to services in their own language as a result of such policies.

Legislation may require that an applicant for registration in a certain trade or profession should have studied at a specified institution. The regulations under the Ontario *Apprenticeship and Tradesmen's Qualifications Act* require an apprentice to take courses at a college of applied arts and technology or the equivalent.<sup>135</sup> Where the equivalent course is taken at a French language institution, course descriptions would be in French. It is sufficiently difficult to establish the equivalency of courses where the material is in one language. Regulations under that act set out course outlines for various apprenticeship programs and require the study of English as part of the training.<sup>136</sup> The level of language sophistication demanded by the regulations is high and would probably deter a unilingual francophone from enrolling.

In most provinces it is necessary to become registered or licensed before carrying on a business; an applicant must usually complete certain forms provided by a government ministry. In Ontario, it is necessary to complete prescribed forms to apply for a licence to run a collection agency,<sup>137</sup> fur farm,<sup>138</sup> nursing home<sup>139</sup> or plant nursery,<sup>140</sup> to distribute paperbacks and periodicals,<sup>141</sup> to manufacture margarine<sup>142</sup> or to sell motor vehicles.<sup>143</sup> This is equally true in British Columbia, where prescribed forms must be completed to run a community care facility,<sup>144</sup> a veterinary laboratory,<sup>145</sup> or to be registered as a mortgage broker,<sup>146</sup> travel agent<sup>147</sup> or motor dealer.<sup>148</sup> This is just a sampling — both jurisdictions could furnish numerous other examples.

The forms are long and complicated. In Ontario and British Columbia they are available in English only, though the Ontario Ministry of Consumer and Commercial Relations is currently in the process of translating public documents into French. This is a slow process, and it may be some time before they are available. At present, British Columbia has no plans to translate its forms into French; however, provincial cooperation could make Ontario forms, once translated, available to B.C.

Some legislation, such as that governing collection agencies in Ontario and British Columbia,<sup>149</sup> requires that all forms and documents used in the business be filed with the appropriate government ministry. If such documents are received in French, officials in both jurisdictions



will do their best to process them without requiring English translations. The same is true if English forms are completed and submitted in French. It appears to be a matter of discretion in the recipient to decide whether forms are acceptable in French.

A multitude of statutes contain oaths of allegiance which must be sworn by officers or employees.<sup>150</sup> These are not always available in French. In Ontario, judges, justices of the peace and court officials may take the oath in French. In British Columbia, such oaths are not available in French, but an interpreter may be called in. The civil service oath in British Columbia is unavailable in French, and there are no plans to make it available.

This brief survey of statutory language requirements indicates that governments tend to impose explicit linguistic requirements in only a limited number of circumstances. In most, if not all, it is difficult to see the social value to which linguistic equality has been sacrificed. In many of these cases, administrative rather than legislative reform is required. Courses and examinations must be made available in French, and forms must be translated. This process is well underway in Ontario; it has barely begun in British Columbia. One would hope that some reciprocal interprovincial use of translated forms will occur. It must be noted in mind that we have not canvassed similar impediments to mobility in the remaining provinces.

Finally, some Ontario legislation shows sensitivity to language diversity in the work force. Under the Ontario *Occupational Health and Safety Act*, an employer is required to post certain information in English and in the majority language of the workplace.<sup>151</sup> The regulations under the act provide that a worker directing traffic must be given "written instructions in a language he can read and understand."<sup>152</sup> Neither provision is directly concerned with providing linguistic equality for French and English in the province, but both reveal an awareness that not all workers speak English.

### *Language and the Courts*

In the context of availability of services in one's own language, attention should be paid to the Canadian judicial system. Outside Quebec, only limited court services are available to the members of the language minority. These services are available in the provinces of Ontario, Manitoba and New Brunswick outside of which, little is available. Some provinces will make an interpreter available at the provincial court level.

Obviously, one of the difficulties in providing for fully bilingual courts is manpower. In this context, the suggestions of Mr. Justice Deschenes should be given full consideration.<sup>153</sup> Mr. Justice Deschenes points out that it is not absolutely necessary for judges to be appointed to one province only and to spend their entire judicial career in that province. He argues that Canada has failed to make use of its many available

francophone judges resident in and appointed to the bench in Quebec. These judges could, in his view, be available nationally, at least in the context of issues arising out of law that could be qualified as federal in origin and national in scope. This is obviously a large proportion of the issues that are litigated in Canadian courts. It would include issues arising under all federal legislation, including the *Divorce Act* and the *Criminal Code*. Free circulation of judges in the interest of the administration of justice in French is, of course, an aspect of free circulation of persons.

It should also be possible in the common law provinces to have an exchange of French-speaking common law trained judges in matters arising out of the private law of the province. Although there are differences in private law at the provincial level, these could be accommodated by members of the judiciary. It is worth noting in this context that appointees to the Supreme Court of Canada are expected to distinguish between the private law of the various provinces, whether that private law is historically based on the common law or civil law system. A province could not itself appoint a judge with extraprovincial competence. However, under provisions of a reciprocity agreement this would be possible. Furthermore, federally appointed judges act on behalf of the federal authority and, as a result, they should be able to act Canada-wide. As Mr. Justice Deschenes points out, transfer of authority over the nomination of judges to the provincial government could aggravate the problem of balkanization of the Canadian judiciary. Instead, nomination could be made to a Canada-wide jurisdiction. Nomination would still come from the local bar of the province in which there was a vacancy. Mr. Justice Deschenes points out that the benefits of such a program would surely match its inconveniences. In addition, a side benefit might result in the form of greater consistency within the provinces with regard to the interpretation of matters arising in the federal domain.

## **Lessons from Other Jurisdictions**

### ***The European Economic Community***

The provisions of the Treaty Establishing the European Economic Community, (EEC), entered into in Rome in 1957, guarantee fundamental mobility rights to the nationals of all member states. These principles, and the jurisprudence that has developed in implementing them, provide, along with the U.S. model, a textual source of the Canadian provisions found in section 6 of the *Canadian Charter of Rights and Freedoms*. They also provide a blueprint for the scope of protection and implementation of use in defining the appropriate extent of mobility rights in Canada.

The U.S. model and the EEC model are fundamentally different in



juristic approach, but each provides precedents of interest to our Canadian system. As Laskin points out, there are fundamental differences between the two models. The U.S. model requires judicial development of guidelines. The legislative model utilized by the EEC provides for greater precision. Canada has opted for the vagueness and inherent flexibility of the judicial model. If section 6 is perceived as an inadequate blueprint for protection of mobility rights, the legislative model of the EEC is of interest.

To enjoy the benefits of a legislative model requires appropriate institutional arrangements for balancing the requirements of public policy and the interests of the provinces and federal government against the economic and personal interest in freedom of movement. As Laskin points out, this balancing requires that "... the legislative capacity must be exercised by a legislature in which the individual jurisdictions have confidence and in which they are represented."<sup>155</sup> He continues that while these criteria are met in both the EEC and in the United States, "... notoriously they do not obtain in Canada, though they could if any of the many current proposals for replacing the Senate with a second chamber representative of the provinces should ever come to fruition."<sup>156</sup> Perhaps confidence has been restored with the election of the majority Conservative government on September 4, 1984.

The EEC is designed as an economic arrangement to foster strengthened economies in member states by reducing the negative impact of unreasonable competition. This is not to suggest that the EEC is an economic alliance only and that rights granted under the treaty are solely economic in nature. However, a fundamental distinction must be drawn between the reciprocal arrangements that sovereign states are prepared to make respecting free movement of nationals, and those that a federalist state should be prepared to make where individuals residing in its constituent units (the Canadian provinces) share a common nationality, common goals, and a common history — in short are Canadians, not nationals of disparate states. Thus, while the model provided by the EEC is of interest, particularly to the extent that mobility rights granted to nationals of the member states are broader than those available in Canada, one would hope and expect that Canadians together would be prepared to go even further in guaranteeing personal mobility rights.

Mobility of persons is protected under the Treaty of Rome by the general principles supporting the EEC and, in particular, through the protection provided with regard to free movement of persons, services and capital by protection of the right of establishment and of the right to offer services.

Part One of the treaty sets out the general principles governing the EEC. Article 3(c) provides that the activities of the EEC shall include "... the abolition, as between member states, of obstacles to freedom of

movement for persons, services and capital.” Article 7 prohibits discrimination on the grounds of nationality.

Part Two of the treaty deals with the foundations of the EEC. It provides in Title 1 for the free movement of goods and in Title 3 for the free movement of persons, services and capital. Article 48 sets out specific provisions with regard to free movement of workers, and reflects the fundamental principles enshrined in Articles 3 and 7. Article 48 provides that the free movement of workers shall be secured within the community and that such freedom of movement shall entail the abolition of any discrimination based on nationality, specifically with regard to employment, remuneration and other conditions of work. The treaty also grants specific rights to accept offers of employment, move freely within the territory of member states, remain in a member state for the purpose of employment and to remain in the member state upon termination of employment.

Several limitations are specifically referred to. Article 48(3) provides that these rights may be curtailed on the grounds of public policy, public security or public health and that the right to stay in a member state for the purpose of employment may be restricted by national provisions concerning employment of a general nature. Employment in the public service may be specifically reserved to nationals (48(4)). Article 49 directs the Council of the EEC to issue directives or make regulations setting out measures designed to implement free movement of workers. Article 49 lists several areas of interest to us in which directives are to be issued. The Commission, after consulting the Economic and Social Committee, is to issue directives or make regulations designed to:

- ensure cooperation between national employment systems;
- systematically and progressively abolish administrative procedures and practices as well as qualifying periods that have had as their scope eligibility for available employment where they constitute an obstacle to liberalization of the free movement of workers;
- systematically and progressively abolish qualifying periods and similar restrictions, which restrictions impose conditions on the free choice of employment by non-state nationals; and
- establish appropriate machinery to bring offers of employment into touch with applications for employment.

In this context a limitation is provided. The objective is to achieve a balance between supply and demand, without creating a serious threat to the standard of living and level of employment in the various regions and industries. Article 50 provides for encouragement of the exchange of young workers. Article 51 specifically requires the Commission to adopt measures in the field of social security designed to favour free movement of workers and, in particular, to take measures designed to enhance



access to social security benefits for those working in a member state other than their own.

Free movement of workers is furthered by the grant of a right of establishment to the nationals of all member states. Article 52 provides for the progressive abolition of restrictions on the freedom of establishment of nationals of a member state in the territory of another member state. The right of freedom of establishment is specifically extended to self-employed persons and to companies or firms. Once again the Council and the Commission are instructed to design general programs for implementation, in order to enhance the right of freedom of establishment. Of particular interest is the provision in Article 57(1) requiring the Council to issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. The right of establishment may be qualified by reasonable measures providing for special treatment of foreign nationals where those measures can be justified on the grounds of public policy, public security or public health.

The third aspect of treaty rights in furtherance of mobility of persons is the right granted by Article 59 to provide services within the Community. The right to provide services to nationals of member states is extended to activities of an industrial character, commercial character and to craftspeople and professionals. Article 60 of the treaty makes it clear that protection is also afforded to the right to provide services by the general provisions relating to free movement of goods, capital and persons.<sup>157</sup>

The model provided by the European Economic Community is of interest to Canadians for two reasons. As Hayes<sup>158</sup> points out, the EEC is a modern attempt to establish and ensure free movement of goods, persons and capital in a context which takes into account contemporary difficulties of government intervention in the economy. Secondly, the EEC functions in the context of a weak political framework. It represents a community of sovereign states and must function in the context of a political framework less cohesive than that represented by the provinces and the federal government in Canada. The breadth of mobility rights granted in the EEC should be attainable by Canadian provinces and the federal government. Canada has stronger historical, governmental and social cohesive ties. As Hayes points out, "Since Canada's federal framework has shown some weakness in recent years, the EEC experience is clearly relevant."<sup>159</sup>

Articles 48 to 66 provide a relatively narrow view of protected economic activity. However, the Council of the European Economic Community, rather than sticking to a narrow interpretative scope for these articles, has been prepared to interpret them in a broad and far-reaching fashion. This broad interpretation, along with the direct effect of these articles so that individuals may seek protection through national courts

and apply for a remedy against both public authorities and private entities, have combined to provide broad-based protection for mobility rights, not only as economic rights but as personal civil rights. By way of example, articles 48 to 66 offer no substantive protection to those workers not in possession of an offer of employment in another member state. The rights of the self-employed are limited on the face of the article so as to allow movement only to establish oneself or to provide services abroad. There are no mobility rights for the unemployed, for persons wishing to investigate the possibility of setting up a foreign establishment or to travel to make contacts.

Nonetheless, the Council of the European Economic Community has interpreted the appropriate articles broadly, in line with the social objectives set out in the preamble and in Article 2, which call for the improvement of living and working conditions within the Community. The court has supported the Council's views. In *Unger*<sup>160</sup> the court held that mobility rights do not accrue exclusively to persons "holding a job at that very moment." *Royer*<sup>161</sup> recognizes the right of an individual to look for work in a member state. *Watson and Belmann*<sup>162</sup> recognizes a right of free movement to recipients of services. While mobility remains work related, and there is no recognition of a right of complete freedom of entry or residence, the court and the Council have given work-related rights a broad interpretation. Nonetheless, the migrant must leave the member state if he fails to find employment or decides against setting up a business. The provider and the recipient of services must leave the member state once their presence there is no longer justified by the contract for services.

These rights have an impact on national legislation of the member states. Those states are not entitled to require non-nationals to comply with the host states' qualifications in the absence of some objective justification for doing so. Thus, in *Thieffry*,<sup>163</sup> the stipulation that a Belgian national meet the requirement of a French law degree as a prerequisite for admission to the Paris bar, was struck down as requiring national qualifications in the absence of objective justification. The French legislation in question was not directly referable to nationality; however, its effect was exclusively or primarily to block activity by foreign nationals. This constituted discrimination in fact. A similar decision was reached in *Patrick*<sup>164</sup> upholding the right of a British-trained architect to practise architecture in France, although holding British qualification only. National measures that appear to be discriminatory on their face may be justified, if shown to be necessary to legitimate national objectives. However, the Court of Justice has relied on a principle of proportionality.

Proportionality requires that an apparently justifiable restriction be struck down to the extent that it is excessive in its alleged attempt to protect national public interest. In *Van Wesemael*<sup>165</sup> and *Webb*,<sup>166</sup>



national legislation imposing conditions on the granting of a licence to carry on the business of an employment agency was held to be excessive where both firms had previously been licensed in their own state of establishment. As the domestic licences had been issued under comparable conditions and where the activity was subject to continuing first state supervision, the host state requirements constituted an unjustifiable interference with the protected right to provide services. The public interest was held to be adequately safeguarded by the licensing provisions of the home state. In addition, inappropriately long delays to obtain membership in the host state or recognition of previously held qualifications would be an unjustified impediment.

The European Economic Community also requires policies of harmonization. These are designed to interfere only with the discriminatory aspect of national measures, while leaving those measures in place. There are four types of harmonization: mutual recognition of qualifications, coordination of provisions governing a particular activity, transitional measures where recognition and coordination are not possible, and facilitative measures of an ad hoc nature. Following the *Reyners*<sup>167</sup> decision, the Council took action on mutual recognition of qualifications. In the six years following the *Reyners* decision, directives were issued on the mutual recognition of qualifications of doctors, nurses, dentists, veterinarians and midwives. Each of these is accompanied by directives coordinating training requirements in the member states. These directives provide for mutual recognition of equivalent qualifications. Evaluation of any individual's qualifications must be concluded by the host state within a three-month period.

Policies of harmonization are exemplified by directives providing for coordination in general training courses. These are apparent in the five health care directives. Coordination in this context refers to coordination in general training courses, the establishment of minimum standards and requirements for specialist training. The member states are free to determine the organization of teaching in these disciplines. The coordination provisions cover academic prerequisites, periods of general and specialist training, program length and some basic guidelines on course content. The directives include a general requirement that the courses comprise theoretical and practical training. Institutions appropriate to carry out recognized training are identified in a general sense.

Other facilitative measures have been adopted in the context of the practice of law. Directive 77-249<sup>168</sup> is designed to implement the *Reyners* decision, giving lawyers the right to pursue their livelihood throughout the Community. The nature of directive 77-249 is quite precise; certain specific areas of practice are excluded, including probate and conveyancing documents, and the host state may require the foreign lawyer to work in conjunction with a national lawyer. It is of interest to us in Canada that the *Reyners* case specifically refused to hold that the legal

profession fell within the exception of article 55 as concerning persons whose activities “are connected, even occasionally, with the exercise of official authority.” The lawyer’s inevitable contact with the judicial process was insufficient to allow the host state to exclude foreign lawyers from the practice of law. The Court of Justice was of the view that the exclusion of non-nationals from an entire field of activity is warranted only where the activity constitutes an integral part of the exercise of official authority. Mere contact with the judicial process is not a sufficient connection. Rather, an act of “official authority” is that involving an executive, legislative or judicial act. However, article 48(4) provides that employment in the public service is entirely excluded from the scope of mobility rights under the EEC. In France and Germany, article 48(4) has been used to exclude non-nationals from the teaching profession.

Also of interest to Canadians is directive 77-486,<sup>169</sup> which provides that the children of non-national workers are entitled to free tuition to facilitate their reception into the host state. The directive requires member states to promote the teaching of the mother tongue of the non-national children. These rights clearly go beyond the scope of treaty rights which generally forbid discrimination, but not special treatment for non-nationals. Technically, the directive refers to Article 49 and is restricted to children of workers and not to the children of the self-employed.

Other facilitative regulations of interest to us include regulation 1612-68,<sup>170</sup> which requires that the employment offices of member states extend assistance to non-nationals equal to that extended to their own nationals. A vacancy clearance procedure is established to assist persons wishing to find employment in other member states. The manpower service of each member state is obliged to inform all services of member states of domestic vacancies on a monthly basis with reference to applicants for appointment abroad by occupation and by region. This procedure provides invaluable information for employers and employees of the nature referred to in the previous discussion of the requirements for true mobility in Canada. The notification procedure required by regulation 1612-68 may be suspended by the Commission at the request of a member state where the particular region or occupation is experiencing or expects to experience “disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation . . . .” Suspension operates without prejudice to treaty rights. However, it deprives the potential migrant of information as to job availability.

The treaty also provides for uniform access to social benefits in the host state. Regulation 1408-71<sup>171</sup> requires that persons with a past or present work connection in the state of affiliation be entitled to certain social benefits, including those for sickness and maternity, family, invalidity, and old age, survivor’s benefits, workers’ compensation and



occupational disease benefits, and unemployment benefits. Regulation 1408-71 is designed to provide for access by non-national residents to the social security measures of the host state. There is no attempt at harmonization of national social security legislation, which varies significantly from state to state in availability and level of benefits. In this context the technique of aggregation is significant. The rules on aggregation are exceedingly complex, their general effect being to provide for recognition of time spent in other member states as an aggregate for qualification for the purposes of entitlement to benefits.

Scholars differ as to the actual impact of the EEC provisions on mobility. Hayes<sup>172</sup> remarks that “the achievements regarding the free movement of people, in the absence of a common citizenship, are truly impressive.” Raworth<sup>173</sup> concludes that “the value of the personal mobility provisions of the Community is open to question.” He points out that there is no absolute right of entry or residence; rather, the non-national must have the appropriate work connection to the member state he wishes to enter and reside in. He continues:

The effect would seem to have been to increase rather than decrease the economic disparities between the various regions of the Community. By encouraging the concentration of the working population in the more prosperous areas, it has helped to consolidate their economic preeminence, while the ensuing depopulation of the poorer areas may well have rendered the problems that beset them even more intractable. As a population dwindles, social and public services are shut down, and the drop in manpower and facilities makes an area even more unattractive for investors. Most insidiously of all, the migration of its nationals to richer lands gives a positive incentive to a government to do little to remedy the ills that call forth the migration; for not only does the exodus lessen the clamour for reform, it also leads to foreign currency remittances by the expatriates that become a significant factor in the recipient state’s economic stability.<sup>174</sup>

Raworth argues that the way to counter this negative impact is to provide for coordination of national economic and social policies in order to minimize differences in standards of living and to provide for the adoption of a common regional policy to eradicate gross imbalances between certain regions of the Community. Such attempts, he points out, have been a catalogue of failure.

Thus, while the far-reaching efforts and development seen in the context of the EEC are a model available to Canadians to provide for open markets for the skills of workers and professionals, this very flexibility once again is seen to exacerbate regional differences and regional interests. For Canada to adopt the legislative structure provided by the EEC alone would be insufficient. While the model of the EEC is a useful one, its adoption must be combined with significant and successful efforts and mechanisms for coordination and exchange, designed to foster cooperation in general national-provincial policy.

## *Mobility Rights under the U.S. Constitution*

Judicial interpretation of the U.S. Constitution has resulted in a broad range of protective measures for mobility rights and in multiple levels of attack on impediments to mobility. The several sources of the constitutionally protected right have led to varying degrees of state and federal latitude to interfere with mobility and to various levels of scrutiny of allegedly impermissible impediments.

U.S. jurisprudence can serve Canada as a reasoned and developing approach to the conflicting impulses that inform our own debate and can assist us in finding an appropriate balance between individual liberties and state interference in the domain of provincial autonomy and federal interest and authority.

The predecessor document to the U.S. Constitution, the Articles of Confederation, specifically recognized freedom to move across state lines and to engage in commercial activity:

The Free inhabitants of each of these states . . . shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively. (Article 4)

Much of this language was carried forward into the interstate “privileges and immunities” and “commerce” clauses of the U.S. Constitution.

Despite the several sources of protection for mobility rights in the U.S. Constitution, the parameters of the debate in the United States mirror those of the debate in Canada. At issue is the nature of the nation, balanced against the legitimate interests of its constituent political units. The national interest in interstate equality must be balanced against the demands of local state obligation to state residents in a manner that respects the legitimate claims of each.<sup>175</sup> The debate occurs in the context of recognition of the nature of a nation. In *Paul v. Virginia*, 75 U.S. 168 (1868) this debate was sharply focussed.

The primary purpose of this clause . . . was to help fuse into one nation a collection of independent, sovereign states. It was designed to ensure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. . . .<sup>176</sup>

Indeed, without some provision of this kind removing from the citizens of each state the disabilities of alienage in the other states . . . the republic would have constituted little more than a league of states.<sup>177</sup>

There are five sources of protection for mobility rights that have been recognized by the U.S. Supreme Court. Four of these find their textual source in the language of the constitution itself. The fifth, best referred to as the rights inherent in citizenship, takes no particular textual source



but has been persistently identified and utilized by the U.S. Supreme Court.

The first of the constitutional sources for protection of mobility rights arises from article 4, section 2 of the U.S. Constitution. That section provides:

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The source of this language can be found in Article 4 of the Articles of Confederation. The second constitutional source is found in Article 1, section 8. That section grants to the federal Congress the power to “. . . regulate commerce with foreign nations, *and among the several states*, and with the Indian tribes;” (emphasis added). This is generally referred to as the “commerce clause.” The third constitutional source of protection for mobility rights is found in the Fifth Amendment to the Constitution. That amendment provides that no person shall “. . . be deprived of life, liberty, or property, without due process of law.” The last textual source of protection for mobility rights in the U.S. Constitution arises out of the Fourteenth Amendment, section 1. That section provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, there is clear authority for an independent right to travel as an incidence of citizenship, although this lacks a particular source in any constitutional text. In *Shapiro v. Thompson*<sup>178</sup> Mr. Justice Stewart, in a concurring judgment, wrote:

The constitutional right to travel from one state to another . . . has been firmly established and repeatedly recognized. This constitutional right, which, of course, includes the right of “entering and abiding in any state in the union” is *not* a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. “The right to travel freely from state to state finds constitutional protection that is quite independent of the Fourteenth Amendment.” . . . [I]t is a right broadly *assertable* against private interference as well as government action. Like the right of association, it is a virtually unconditional personal right, guaranteed by the constitution to us all.<sup>179</sup>

All of these sources have provided important constitutional protection for mobility rights. The privileges and immunities protection of Article 4, section 2 has emerged as the most significant.

A detailed review of U.S. constitutional protection for mobility rights

would be inappropriate in a study of this kind. However, some reference must be made to the nature of judicial development of protection for mobility rights in the various constitutional contexts.

Article 4, the commerce clause, served as the early source for judicial disallowance of state impediments to mobility. Article 4, like section 121 or 91 of the *Constitution Act, 1867* is essentially a text granting unlimited authority to the federal Congress; it is an impediment to state activity only. Attack on the constitutionality of federal exercise of legislative authority must be based elsewhere. Nonetheless, the commerce clause has been a powerful tool in the attack on state interference with mobility rights. State interference which unduly burdens interstate commerce is constitutionally impermissible.

The commerce clause bars state-imposed impediments on out-of-state citizens that interfere with the right to do business on terms of substantial equality with that state's own citizens. Discrimination is unconstitutional where no substantial justification is offered other than out-of-state citizenship. Disparity of treatment between state and out-of-state citizens, or residents, is constitutionally valid only where independently justifiable. The court must inquire whether valid reasons, other than residence, exist to justify the impugned legislation. Even where those reasons exist, the remedy must "bear a close relation to the evil." This inquiry must, in the language of the court, be conducted "with due regard for the state's right to have considerable leeway in analyzing local evils and prescribing appropriate cures." Thus, out-of-state citizens must be a particular source of evil, and the remedy must be appropriate. In *Toomer v. Witsell*<sup>180</sup> South Carolina legislation virtually prohibiting non-residents from the shrimp fishery was held unconstitutional as violating the commerce clause. In *Edwards v. People of the State of California*<sup>181</sup> a California statute that made it a misdemeanour to bring or assist a non-resident indigent person into the state was successfully attacked under the commerce clause. The court relied on congressional authority to regulate interstate commerce, holding that the transportation of persons is commerce. Commerce clause protection is invoked to protect individuals unrepresented in the state political process owing to lack of state residence.

In certain broad circumstances commerce clause protection is ineffective. Constitutional doctrine allows state discrimination against non-residents where the state is acting as a market participant rather than a market regulator and this distinction has been the subject of academic attack and of attack in the court itself. Nonetheless, the distinction persists. In *White v. Massachusetts Council of Construction Employers*<sup>182</sup> an executive order of the mayor of Boston requiring all construction projects funded in whole or in part by city funds to be performed by a workforce of at least 50 percent bona fide city residents withstood constitutional attack under the commerce clause. In the view of Mr.



Justice Rehnquist, the government was acting as a market participant and not a market regulator. The commerce clause was available only to attack the actions of the government in its capacity as market regulator. Further, to the extent that funds for the projects were made available by the federal government, commerce clause attack was ineffective. Worse, where constitutional doctrine describes the government in question as a market participant rather than a market regulator, scrutiny of the breadth of the legislative tool used to address the perceived wrong, and of the actual legitimacy of the perception that non-state residents constitute an evil, is inappropriate.

It should be noted that *White* did not address the issue of constitutional validity under the privileges and immunities clause. Similar provisions were struck down under that clause in *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*.<sup>183</sup>

An alternative source of invalidity of state-imposed impediments to mobility is found in the equal protection language of the Fourteenth Amendment which, like the commerce clause, is available as a basis for impugning state action only; it is unavailing against federal legislation. However, discrimination against non-residents is usually, although not invariably, found at state level. Despite being unavailing against federal action, the equal protection provisions of the Fourteenth Amendment constitute a powerful impediment to state interference with mobility rights. Two of the key U.S. cases striking down state-imposed impediments to mobility found their constitutional basis in the Fourteenth Amendment.

In *Shapiro v. Thompson*<sup>184</sup> an attack was brought against several state provisions denying welfare assistance to persons who failed to meet the requirements of a one-year durational residency test for entitlement to benefits. The court based its determination that state provisions of this nature were unconstitutional on the equal protection clause and on recognition of a constitutional right to travel. Equal protection of the law prohibits a distinction between citizens solely on the basis of contribution to the state fisc. Nor is it sufficient for the state to establish a rational relationship between the durational residence requirement and permissible state objectives. Rather, when examining state legislation violative of the equal protection clause, the legislation may be justified only where it can be shown to be necessary to promote a compelling government interest. Furthermore, it is not necessary to show that any individual was actually deterred in exercising his right of mobility; it is sufficient that state legislation be a potential deterrent.<sup>185</sup>

The requirement that the state justify impugned legislation by establishing a compelling state interest makes the equal protection provisions a powerful constitutional weapon against state-imposed impediments to mobility. The compelling state-interest test is virtually impossible to

satisfy. It should be noted that the strict scrutiny involved in court examination of a state claim of compelling state interest makes it necessary to examine the state argument closely. The protected interest is one of fiscal efficiency, administrative convenience or reasonable allocation of cost. Most often, evidence brought forward by the state to establish the cost base rationality of state provisions proves unconvincing. Even where, hypothetically, the state succeeds in establishing a cost base rationale for state action, strict scrutiny forces the state to establish that other, less intrusive, means could not equally have been adopted. Thus, in *Shapiro v. Thompson*, the state argued that the requirement allowed apportioning of state benefits and services according to past tax contributions of state residents, that the residency requirement facilitated planning of the state welfare budget, that it provided an objective test of residency, minimized the opportunity for multiple jurisdiction fraud and encouraged early entrance of new residents into the labour force. The court recognized each of these objectives as legitimate. The state was unable to offer sufficient evidence that the impugned legislation actually accomplished the legitimate objectives. Further, the court was of the view that less drastic measures were available to meet those same state objectives.

What is of use to Canadian courts here, is the rigour with which the U.S. Supreme Court requires proof that palatable state objectives are furthered by the impugned legislation. Rigour in examining the actual nexus between the legislative or administrative impediment to mobility and legitimate state objectives is imperative. A similar examination was required by the court in *Dunn v. Blumstein*<sup>186</sup> involving a constitutional attack on a 12-month state residency and a 3-month county residency requirement for the right to vote. Both the 12-month and the 3-month durational residency requirements were struck down, in part under the equal protection provisions of the Fourteenth Amendment. Tennessee offered two basic state interests in support of the residency requirements. State rationale was subject to “compelling state interest” scrutiny by the court. The rationales offered were, first, to ensure purity of the ballot box and to protect the state against fraud through colonization and, second, assurance of a knowledgeable voter. The court recognized these as legitimate state objectives. Nonetheless, the court examined the relationship between the residency requirements and the objectives, and concluded that durational residency requirements were ineffective to further state objectives and constituted too crude a device for achieving state goals.

Similarly, in *Memorial Hospital v. Maricopa County*,<sup>187</sup> an Arizona statute imposing a one-year durational residency requirement for entitlement to non-emergency hospital or medical care at county expense was held to be constitutionally impermissible under the equal protection clause. Arizona alleged that broad fiscal benefits were to be obtained by



the residency requirement, and it argued administrative convenience, prevention of fraud and budget predictability. The court examined all of these and found no evidence that the legislation actually accomplished these bona fide objectives. Even if the state had succeeded in establishing a relationship between the impugned legislation and such objectives, it would have been necessary to show that state objectives could not have been accomplished in a constitutionally less intrusive fashion.

Scrutiny under the Fourteenth Amendment is available wherever the state distributes benefits or burdens inequitably. Legislation that institutionalizes inequality with respect to a liberty, property or other interest such as receiving welfare or medical benefits, may interfere with the exercise of the independently protected right to travel. Secondly, interference with access to fundamental rights, in the sense that fundamental rights are available on an inequitable basis, is equally suspect. This second branch of equal protection is less significant in the context of mobility. Residency requirements interfering with the right to vote fall into this category.

It is possible to see the cases that strike down impediments to mobility under the Fourteenth Amendment as essentially ones that deal not so much with the constitutionally protected right to travel as with wealth as a constitutionally suspect classification. For this reason, many of the more recent attacks on impediments to mobility sound in the context of the privileges and immunities clause of Article 4. While the strict scrutiny, compelling state-interest test does not apply to Article 4, many U.S. commentators see Article 4 as a constitutional basis of attack more likely to succeed.

Article 4(2) provides that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” Similar language is found in the Fourteenth Amendment. In two recent leading cases striking down state impediments to interstate mobility, Article 4 was the basis upon which a successful challenge was made.

In *Hicklin v. Orbeck*<sup>188</sup> an Alaska statute provided for preferential hiring of qualified Alaska residents over non-state residents; Alaska residence was defined as one-year durational residence. The statute was subject to a successful constitutional attack on the basis of Article 4. The state bears the burden of rigorously proving facts that support its allegation that the legislation does not violate Article 4(2). To justify derogation from Article 4 the state must show that non-residents constitute a peculiar source of evil at which the statute is aimed. Alaska failed to establish that non-residents were a peculiar source of evil. The court found that the major source of unemployment was not an influx of non-residents, but:

[T]he fact that a substantial number of Alaska’s jobless residents — especially the unemployed Eskimo and Indian residents — were unable to

secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities.

Even had the state succeeded in establishing that non-residents were a peculiar source of evil, the legislation would still have failed to pass constitutional muster because the legislative solution was too broad. The legislation discriminated against non-residents in ways which failed to show a substantial relationship to the particular evil they were said to represent. Specifically, the act was drawn so as to give preferred status to all residents of Alaska, regardless of their employment status, education or training. Highly skilled and educated residents who had never been unemployed, would be entitled to the same hiring preference available to unskilled, habitually unemployed Arctic Eskimos. In the view of the court, the legislation, to be constitutional, must be drafted so as to be “closely tailored to aid the unemployed the Act is intended to benefit.” Alaska was entitled to deal with its unemployment problem; but an across-the-board grant of job preference to all Alaskan residents was too blunt a constitutional instrument. There was “insufficient justification for the pervasive discrimination against non-residents that the Act mandates.”<sup>189</sup>

A similar approach was taken by the U.S. Supreme Court in the recent decision in *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*,<sup>190</sup> the facts in which are similar to those in *White v. Massachusetts Council of Construction Employers*. Commerce clause attack on preferential hiring provisions in the *White* case was unsuccessful. An attack against similar New Jersey provisions, under the privileges and immunities clause of Article 4, succeeded. In the *City of Camden* case, an ordinance of the City of Camden required all city contractors and subcontractors to hire a minimum of 40 percent of its employees from persons resident in Camden. The U.S. Supreme Court held that these preferential hiring provisions violated Article 4. In doing so, the court held that Article 4 applies to municipal as well as state legislation. The fact that out-of-city New Jersey residents were equally the subject of discrimination did not save the legislation from attack. New Jersey state residents living outside Camden have no remedy under Article 4 but in exercising their right to vote in state elections. The state bears the burden of proving that there was a “substantial reason” for discrimination against non-residents. Furthermore, the right of non-state residents to seek employment in the state was sufficiently fundamental to be entitled to protection under Article 4.

Mr. Justice Rehnquist, speaking for the court, undertook a two-step analysis to determine whether the New Jersey legislation violated the privileges and immunities clause. First, it must be determined whether the legislation in question breaches a privilege or immunity protected by Article 4. Not all forms of discrimination against citizens of other states



is constitutionally suspect and the judge referred to *Baldwin v. Montana Fish and Game Commission*,<sup>191</sup> which upheld discriminatory fees for hunting licences as follows:

Some distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those “privileges” and “immunities” bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and non-resident, equally.

The interest in employment is fundamental enough to attract Article 4 protection and the court stated that the pursuit of a common calling will be protected by the clause. Further, Mr. Justice Rehnquist acknowledged that the constitutional purview of Article 4 is broader than that of the commerce clause and that it is possible for legislation to survive commerce clause scrutiny but to fail the test of Article 4.

The second prong of the test must be met even where the legislation discriminates against a fundamental privilege. Article 4 protection is not absolute. Where the state can show a “substantial reason” for discrimination, the legislation may be constitutionally valid. “The inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.”<sup>192</sup>

In the *City of Camden* case, Camden had argued that city interests in counteracting grave economic and social ills justified the discriminatory ordinance. Spiralling unemployment, a decline in population and reduction in businesses located in the city had eroded property values and depleted the city’s tax base. The ordinance was designed to improve that situation. Non-residents were a source of the evil that the ordinance was aimed at.

Mr. Justice Rehnquist cautioned that all inquiries under the privileges and immunities clause “must . . . be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures.” He distinguished the *City of Camden* case from *Hicklin v. Orbeck* in that the Alaska hire statute applied not only to those contracting directly with the state, but also covered suppliers providing goods and services to those contractors. In *Hicklin v. Orbeck*, the legislation was held to be unconstitutional as “an attempt to force virtually all businesses that benefit in some way from the economic ripple to bias their employment practices in favour of the state’s residents. In the *Camden* case there is no similar ‘ripple effect.’ The Camden ordinance is limited to employees working directly for city public works projects.” The case was remanded to the New Jersey Supreme Court for proof of facts.

There is also academic and judicial dissatisfaction with a preliminary inquiry as to whether or not rights are fundamental. Nor does the

standard of strict scrutiny apply to examination under Article 4. What is useful about the Supreme Court analysis under the “privileges and immunities” clause is the court’s emphasis on identifying non-residents as a source or cause of the problem the legislation is designed to deal with and its requirement that the legislative response bear a precise and substantial relation to the problem presented. The emphasis on proof of facts in the constitutional analysis is key.

Other bases of constitutional protection of mobility rights are occasionally used. The due process clause of the Fourteenth Amendment was raised in a constitutional attack against a one-year residency requirement imposed by the State of Iowa<sup>193</sup> to file a divorce petition. The state argued that it had a legitimate interest in protecting itself against becoming a “divorce mill.” The U.S. Supreme Court held that durational residency requirements are not per se impermissible. Rather, those cases denying durational residency requirements for the purposes of welfare, voting, and medical care were constitutionally impermissible as their alleged justification on the basis of budgetary or administrative convenience was held insufficient to outweigh constitutional claims. Permanent and irrebuttable presumption of non-residence<sup>194</sup> does violate the due process clause, as does a total deprivation of access to the courts on the basis of indigence.<sup>195</sup> Unlike scrutiny under the privileges and immunities clause, equal protection analysis requires proof of a compelling state interest.

Finally, there has been recognition of a constitutional right to travel inherent in citizenship that finds its basis in the history of the U.S. Constitution rather than in the language of any particular article of that constitution. In *Doe v. Bolton*,<sup>196</sup> a residency requirement imposed by the State of Georgia on entitlement to abortion in public facilities was held to be unconstitutional. Here too, there was an examination by the court of the facts underlying state rationale for exclusion of non-residents from state facilities. The legislation in question applied not only to state medical institutions but to private hospitals and privately retained physicians as well. The court was of the view that in the absence of evidence that state facilities were utilized to capacity in caring for Georgia residents, limitations on non-residents could not be justified on fiscal or administrative grounds.

Constitutional attack on impediments to mobility of U.S. citizens is in a state of flux. What is key to the analysis of state-imposed impediments, regardless of the basis of that attack, is careful examination by the court of those facts and rationales alleged to justify discriminatory action. In the absence of a clear identification of the evil inherent in equal treatment of non-residents, the impediment cannot stand. Even where the access by non-residents is appropriately identified as a problem, state interference with mobility must be drawn precisely. It is limited by the requirement that legislative limitation on access by non-residents to



state services be designed specifically to remedy the identified problem. To the extent that the scope of the impediment cannot be justified, it is constitutionally impermissible. The rigour of this analysis should serve as a model for Canadian judicial consideration of the rights granted under section 6 of the *Canadian Charter of Rights and Freedoms*.

## Legal Protection of Mobility Rights in Canada

### *Under the Constitution Act, 1867*

There are few constitutional impediments to the ability of either level of government to erect barriers to mobility. Constitutional jurisdiction over labour and services was assigned primarily to the provinces under the *Constitution Act, 1867*. Provincial jurisdiction over labour and employment arises out of subsection 92(13), property and civil rights in the province.<sup>197</sup> Conditions of work and of employment may be imposed by the provincial legislature in exercise of its jurisdiction. Regulation of the trades and professions is equally within provincial jurisdiction.<sup>198</sup> The only exception to provincial jurisdiction is in the context of those institutions reserved to the federal government such as banks (91(16)), interprovincial undertakings and undertakings for the general benefit of Canada (92(10)).

Only twice have Canada's highest courts held that impediments to mobility of labour were unacceptable. The impediments to mobility in the two cases were fundamentally different in nature. The first occasion was the decision of the Privy Council in *Union Colliery v. Bryden*,<sup>199</sup> the second, the decision of the Supreme Court of Canada in *Winner v. S.M.T. (Eastern) Ltd.*<sup>200</sup> As interesting and as admirable as these two cases are, they are mere historical glimmers in the dark night of personal mobility in Canada. In the *Union Colliery* case, the Privy Council struck down legislation prohibiting persons of Chinese descent from working in British Columbia's mines in reasoning that was somewhat tortured. The Privy Council argued that the reference to "Chinamen" in the Coal Mines Regulations was meant to "denote, or certainly to include" alien Chinamen. As naturalization and alienage was a head of power specifically reserved to the federal government under subsection 91(25) of the *Constitution Act, 1867*, provincial legislation constituted an unwarranted infringement of federal jurisdiction and, as such, it was ultra vires.

This is a flimsy way to invalidate legislation that is discriminatory on the basis of race, and constitutes an impediment to mobility of labour inter- and intraprovincially. From the vantage point of 1985, we have no difficulty in agreeing that the case was right in its result. The discriminatory legislation was struck down as ultra vires of the provincial legislature.

Unfortunately, the Privy Council abandoned both the reasoning and the

result of the *Union Colliery* case only four years later. In *Cunningham v. Tomie Homma*,<sup>201</sup> the Privy Council upheld the British Columbia *Elections Act*, which excluded individuals of Japanese, Chinese or Indian descent from the franchise. The Privy Council was unconvinced by the argument that discriminatory legislation of that nature must be meant to refer to aliens and was ultra vires as interfering with subsection 91(25). It held that subsection 91(25) reserved to the provinces the right to enact legislation which discriminated, on the basis of race, against citizens and aliens equally and furthermore, that the consequences of alienage and naturalization were left to the jurisdiction of the provincial governments; subsection 91(25) reserved to the federal government the power to define alienage and naturalization only; defining the privileges of residence was left to the provinces. Nonetheless, the Privy Council's re-interpretation of the judgment in *Union Colliery* provided a brief point for hope. The Privy Council, in discussing *Union Colliery*, commented:

The regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

The failure of the *Union Colliery* case to take firm hold of the Canadian judicial imagination allowed provinces to impact on mobility of labour by restricting the right to the franchise, by prohibiting certain classes of persons from acting as the employers of certain other classes<sup>202</sup> and by prohibiting the employment of other groups.<sup>203</sup> In none of these cases did any Canadian court conclude that there were certain rights attendant on legal residence or citizenship in Canada that could not be interfered with by the provinces. In *Co-op Committee on Japanese Canadians v. A.G. Canada*,<sup>204</sup> Lord Wright concluded that the federal government had the constitutional authority to deport Canadian citizens of Japanese descent, even in the absence of consent to deportation.

Only once in Canadian judicial history has a judge spoken in favour of the rights of citizenship. At issue in *Winner v. S.M.T. (Eastern) Ltd.* was the constitutional jurisdiction of the Province of New Brunswick to regulate motor carrier traffic regardless of the extraprovincial origin of the route. In striking down the provincial claim, Mr. Justice Rand chose to avoid a technical analysis of the nature of the activity regulated, in the context of sections 91 and 92 of the then *British North America Act*. Rather, he focussed on the nature of citizenship, and on the rights and obligations basic to that status. Rand, J. identified constitutional jurisdiction with regard to citizenship with the residual powers of the federal government. He reviewed and adopted the gloss on the *Colliery* case in *Tomie Homma*, adding:



[A] province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action. The contrary view would involve the anomaly that although British Columbia could not by mere prohibition deprive a naturalized foreigner of his means of livelihood, it could do so to a native-born Canadian.

Mr. Justice Rand suggested that the province could validly regulate economic activity in other aspects that do not so profoundly interfere with the constituent elements of citizenship. The reference to the anomalous impact of the scope of provincial jurisdiction to impede the activity of its own citizens will return to haunt us in our discussion of section 6 of the *Canadian Charter of Rights and Freedoms*.

Mr. Justice Rand was of the view that a province could exclude Canadians from entering its borders only in temporary circumstances, for local reasons. The example he chose was health. From this we may conclude that he believed that provincial jurisdiction to limit entrance to a province was decidedly narrow. In doing so, Rand, J. had his eye firmly set on the nature of the Canadian union. This is clear from the language of his judgment; recognizing broader provincial jurisdiction would be tantamount to creating “a number of enclaves” resulting in the “disruption” of the original union. He continued:

Highways are a condition to the existence of an organized state: without them its life could not be carried on. To deny their use is to destroy the fundamental liberty of action of the individual, to prescribe his participation in that life; under such a ban the exercise of citizenship would be at an end.

We have quoted at length from the reasons for judgment of Mr. Justice Rand in the *Winner* case. The language is fertile ground for the growth of protection for mobility of labour. Mr. Justice Rand stands as a lone centralist in the debate over provincial jurisdiction to impede mobility. His views never struck fire in the hearts of Canadian jurists and they were specifically repudiated by Chief Justice Laskin in the *Morgan* case.<sup>205</sup> Had our courts been more creative, had they heeded the vision of Mr. Justice Rand, the many impediments to mobility of labour, the validity of which were unquestioned prior to the *Canadian Charter of Rights and Freedoms*, might have been struck down. The failure of the Canadian judiciary in this context is less noticed but, nonetheless, parallel to its failure to put constitutional content into federal jurisdiction over trade and commerce in subsection 91(2). It is a piece of the whole cloth.

Other attacks against restrictions on mobility factors were taken based on other grounds. In *Walter v. A.G. Alberta*,<sup>206</sup> legislation restricting ownership of land in Alberta was attacked on the basis of interference

with religion and therefore beyond provincial jurisdiction. This attack failed. The legislation was upheld as being a valid exercise of provincial jurisdiction over property and civil rights in the province. An attack on Ontario legislation imposing a tax burden on non-resident land owners in Ontario was unsuccessful. Again, the Ontario High Court of Justice, Henry J. upheld the legislation as a valid exercise of provincial jurisdiction. The act did not, in his view, infringe federal jurisdiction over naturalization and aliens.<sup>207</sup> In *Re Dickenson and Law Society of Alberta*,<sup>208</sup> the Alberta Supreme Court, Trial Division, upheld provincial legislation precluding non-citizens from membership in the Law Society of Alberta on the basis that it constituted valid provincial legislation. It did not trench on federal jurisdiction with regard to aliens and naturalization. Furthermore, it fell within the exclusive provincial jurisdiction to legislate in respect to the administration of justice in the province (92(14)). The court relied on *A.G. Canada v. A.G. Ontario*<sup>209</sup> that:

The courts of each province, including the judges and the officials of the court, together with those persons who practise before them, are subject to the jurisdiction and control of the provincial legislature; that legislature and no other has the right to prescribe rules for the qualifications and admission of practitioners, whether they be pleaders or solicitors.

Nor did the provincial *Individuals Rights Protection Act* prohibit the requirement of citizenship where it prohibited discrimination on the basis of "place of origin."

Discrimination on the basis of place of origin would encompass even Canadian citizens and British subjects who came originally from some place other than whatever place might be named in hypothetical discriminatory legislation.

The court went on to state at length that it could see no justification for the requirement of citizenship.

In *Morgan v. A.G. P.E.I.*, Chief Justice Laskin upheld the validity of provincial legislation prohibiting ownership of larger parcels of land by non-residents of the province. In upholding the legislation, Chief Justice Laskin noted that the gloss imposed on *Union Colliery* by the Privy Council in *Tomie Homma* was "difficult indeed to discern." The prohibition imposed by the Province of Prince Edward Island could not be described as an attempt, whether direct or indirect, to exclude aliens from the province or to drive out aliens there residing. Nor, in the view of Chief Justice Laskin, could the prohibition against employment of Chinese persons in underground mines be so taken. The Chief Justice upheld the provincial legislation as being in furtherance of a valid provincial object and in no way sterilizing the general capacity of an alien or a non-resident citizen. The *Morgan* decision constitutes a complete rejection of a doctrine of inherent rights as incidents of Canadian citizenship.



Provincial authority with regard to property and civil rights in the province is the operative jurisdictional focus. We must conclude that prior to the patriation and amendment of the *Constitution Act* and the addition of section 6 of the *Canadian Charter of Rights and Freedoms*, there were virtually no serious constraints on provincial jurisdiction to impose impediments on mobility.

We ought not to leave this recitation of unfortunate legislative provisions without noting that, while there may be no constitutional limits on the authority of the provinces to pass discriminatory legislation under the *Constitution Act, 1867*, the provincial legislatures have enacted provincial human rights codes that would sterilize the impact of such legislation. Sections of the *Canadian Charter of Rights and Freedoms* will have the same effect.

It must be remembered that Canada is a federal state and a single nation. Freedom of movement must mean more for residents of Canada who would move from province to province than it does for the nationals of one state who would enter another state, where both states are signatories to an international treaty or convention. In this context the U.S. model should be more compelling than that drawn from the European Economic Community.

## ***Under Section 6 of the Canadian Charter of Rights and Freedoms***

### CONSTITUTIONAL HISTORY OF SECTION 6

In the discussions concerning a new constitution for Canada, recognition of the right to mobility of persons, goods, services and capital has been a recurring theme. Constitutional entrenchment of mobility of factors of production received widespread support from the various federal, provincial and independent organizations that turned their attention to a new constitution. Constitutional guarantees for mobility of persons received early support from the Quebec delegation to the Continuing Committee of Officials on the Constitution, in July 1968. Entrenchment of mobility rights, the right to acquire property and the right to pursue employment in any province appeared in the constitutional amendment bill of June 1978. A concept of free mobility of persons, goods, services and capital received support from the Canadian Bar Association Committee on the Constitution and from the Task Force on Canadian Unity, as well as from the Province of Ontario. The constitutional committee of the Quebec Liberal party took the same view.

The August 1980 discussion draft of the *Canadian Charter of Rights and Freedoms*, provided to the provinces by the federal government on a confidential basis, included broad based mobility rights. The first public draft of the *Charter*, circulated in October 1980, also made provisions for

entrenchment of mobility rights. However, as a result of provincial pressures brought to bear on the federal government, the mobility rights section in the October 1980 draft included limitations on previously broader rights. The October 1980 version did not provide for a right to acquire and hold property. In addition, a second qualification had been imposed. Section 6 had acquired what was to become paragraph 6(3)(b), legitimizing reasonable residency requirements for the receipt of publicly provided social services.

The mobility rights section survived in this form through the third, fourth and fifth versions of the *Charter*. The fifth version was submitted to the Supreme Court of Canada in the *Constitutional Amendment Reference*<sup>210</sup> case. Final changes were made to mobility rights in the November 1981 version of the *Charter* following the agreement reached in Ottawa between the federal government and the provinces, with the exception of Quebec. The *raison d'être* of that agreement resulted from the decision of the Supreme Court of Canada in the *Reference* case. The affirmative action provisions of subsection 6(4) were added at that time. Section 6 continued unchanged through the December 1981 final version of the *Charter*, and it is that version that was proclaimed in the *Constitution Act, 1982*.

In *Le Devoir*,<sup>211</sup> Herbert Marx argued that the 1980 version of mobility rights was simply the codification of existing constitutional law. To the extent that he was correct, we would have been obliged to conclude that the constitutional entrenchment of protection for mobility of factors of production would be, at best, a sorry disappointment. By 1981, additional exceptions had been appended to the mobility rights section of the *Constitution Act, 1982*.

Hailed from the government benches as enshrining fundamental political and economic rights, the provisions of section 6 were admitted to be unpalatable to the provinces. The Honourable Jean Chrétien, then minister of justice, said in the House of Commons on October 6, 1980 that:<sup>212</sup>

Our conception of Canada is one where citizens as a matter of right should be free to take up residence and to pursue a livelihood anywhere in Canada without discrimination based on the previous province of residence. In other words, no Canadian should be prevented from seeking a job anywhere in Canada merely on the grounds that he or she comes from another province. This right which is inherent in Canadian citizenship will be enshrined in the Charter and will be binding on all governments.

This does not mean that provinces cannot impose their normal laws on those who come or move to their province. It simply means that they cannot single out certain Canadians for harsher treatment just because they come from other parts of the country. In other words, there will be one Canadian citizenship; not ten provincial citizenships.

However, asked in January 1981 how many provinces opposed mobility



rights, Mr. Chrétien was obliged to admit that there had been general opposition. Asked to define general opposition Mr. Chrétien replied:

Ontario supported it and there might be another province — Nova Scotia, of course, was the other one.

Others appearing before the special joint committee were less comfortable with the protection afforded by section 6. Nicole Dumouchel, speaking as a member of the board of the Canadian Council on Social Development, raised the concern, also raised by others, that section 6 allowed provincial governments to prevent mobility of individuals on any grounds except residency and the general prohibitions on discrimination found in other sections of the *Charter*. Concerns were also raised about the paragraph 6(3)(b) provisions allowing reasonable residency requirements for qualification for social services. Others were obviously concerned that section 6 allowed the provinces broad scope to establish impediments to mobility of persons within the province as long as those impediments were not linked to a determination of the province of present or previous residence. When asked whether, for example, the Ontario government could discriminate against southern Ontario residents working in Northern Ontario, but not against residents of Quebec, Mr. Chrétien was obliged to reply:

They can discriminate against both, but not only against the citizen of Quebec because he is a citizen of Quebec, or a citizen of Manitoba because he is a citizen of Manitoba. But if he puts a restriction on his own citizens, just like the rest of Canada, that is fine . . . .

## MEANING AND SCOPE OF SECTION 6 OF THE CHARTER OF RIGHTS AND FREEDOMS

Section 6 of the *Canadian Charter of Rights and Freedoms* guarantees “mobility rights” to all Canadians. To what extent does this constitutional guarantee of “mobility rights” invalidate impediments to mobility of labour of the nature that we have been describing? Should section 6 of the *Charter* prove to be less than completely effective in eliminating barriers to mobility, are there other sections of the *Constitution Act, 1982* that impact on impediments to mobility? Does Canada’s new Constitution strike the appropriate balance between the protection of the Canadian economic union and of the jurisdiction of its two constituent parts, the federal and the provincial governments, and are further reforms necessary?

We may consider section 6 as having two substantive parts. The first, in subsection (1), guarantees mobility rights of a specific nature to Canadians who are citizens of Canada. The rights guaranteed are the rights to enter Canada, to remain in Canada and to leave Canada. These

rights are not granted to permanent residents. This is not surprising since permanent residents, as defined by the *Citizenship Act*, are in Canada on a quasi-probationary status only. Before being entitled to the full privileges of citizenship, additional criteria, including a period of residence, must be satisfied.

Subsection 6(2) is broader in scope and provides mobility rights of the nature that concern us in our study of impediments to mobility of labour. Subsection 6(2) rights are granted both to citizens and to permanent residents. Two substantive rights are guaranteed; the first, in paragraph (a), is the right to move and take up residence in any province; the second, in paragraph (b), is the right to pursue the gaining of a livelihood in any province. We will consider below the relationship between these two rights.

## SECTION 6 EXCEPTIONS

Subsections 6(3) and (4) provide a series of limitations on the rights enshrined in subsection 6(2). The substantive rights granted by subsection 6(2) are limited by:

- laws of general application, as long as they do not discriminate on the basis of province of residence;
- laws imposing reasonable residence requirements before entitlement to publicly funded social services; and
- affirmative action programs in those provinces with a rate of employment below the national average.

Section 6 escapes the impact of section 33 of the *Charter*. Neither the provincial nor the federal government may enact legislation contrary to guaranteed mobility rights. However, mobility rights are subject to section 1 of the *Charter*. Section 6 rights are guaranteed only to the extent compatible with those reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Legislation that derogates from section 6 will be constitutional to the extent that it can be justly described as falling within the ambit of section 1 of the *Canadian Charter of Rights and Freedoms*.<sup>213</sup>

### *Case Law under Section 6*

There is now a small but significant body of case law concerning section 6 of the *Canadian Charter of Rights and Freedoms*, and among the recent decisions concerning the nature and scope of section 6 we may include that of the Supreme Court of Canada in the *Skapinker*<sup>214</sup> case and of the Federal Court of Appeal in *Demaere v. The Queen*.<sup>215</sup> The courts of appeal of three of the provinces — Quebec, Nova Scotia and Ontario — and of the Northwest Territories have released judgments that define the scope of section 6 mobility rights.



Jurisprudence concerning the scope of section 6 must, in our view, be described as a grievous disappointment. Section 6 rights, as described above, are narrow and subject to too many exceptions and limitations. Section 6, as written, provides small consolation to those who would have tied the hands of the federal and provincial governments in the context of impediments to mobility. The narrow scope of section 6 has been narrowed even further in those few cases in which its scope has been considered. Not all aspects of section 6 have been definitively examined by our courts, but its scope is now so restricted that the enthusiasm of counsel in further investigating its ambit of protection must be significantly diminished. Counsel looking for ways to protect individuals from the negative impact of impediments to mobility must look elsewhere. Judicial response to section 6 is all the more disappointing to the extent that it indicates the approach Canadian courts will take to the fundamental rights and freedoms enshrined in the *Charter*.

In only one of the cases arguing section 6 protection against the impact of provincial legislation has the *Charter* been held to provide such protection. In all other cases, on one ground or another, provincial or federal legislation limiting the freedom of the individual has been upheld.

Section 6 is not an easy section to construe. Attempts to determine the scope of the section are complicated by discrepancies in drafting of the English and the French versions. Let us take the rights codified by section 6 *seriatim* and consider the decisions of Canadian courts faced with defining the scope of constitutionally protected mobility rights for the first time.

Subsection 6(1) was one of the first sections of the *Charter* to come before Canadian courts. In *R. and the Federal Republic of Germany v. Rauca*, the Ontario Court of Appeal delivered reasons for judgment concerning the nature of subsection 6(1) of the *Charter* and the impact of section 1 on section 6. In a careful and scholarly judgment, the Ontario Court of Appeal stated its view that the subsection 6(1) right granted to citizens to “remain in” Canada was breached by the *Extradition Act* and *Treaty*.

At issue was the deportation to the Federal Republic of Germany of an individual, Rauca, to stand trial for war crimes allegedly committed during the Nazi occupation of Lithuania during the Second World War. The Court of Appeal held that extradition violated the right to remain in Canada. However, section 1 of the *Charter* justified derogation from section 6 protection in the circumstances. The burden of establishing that the *Extradition Act* and *Treaty* constituted a reasonable limit on subsection 6(1) rights and could be shown to be demonstrably justifiable in a free and democratic society was, in the view of the court, imposed squarely on the one who would claim that limitation. As the state was proceeding to the extradition of Mr. Rauca, in violation of his section 6 rights, it bore the burden of proof that the *Extradition Act* could be

justified under section 1. In *Rauca*, the state succeeded in proving extradition to be a demonstrably justifiable limit. In reaching this conclusion, the Ontario Court of Appeal pointed out that rights and freedoms are never absolute. Qualifications and limitations are always necessary for the purpose of protecting competing interests in a democratic society. To determine the impact of competing interests in the case at hand, the court examined the nature of crime, Canada's obligations to the international community and the history of extradition legislation. In that context, the court concluded that subsection 6(1) and the *Extradition Act* could co-exist. Rauca's right as a citizen to remain in Canada was superseded by the state's interest in the extradition of criminals and in meeting its historical obligations to the international community. What is most admirable about the judgment of the Ontario Court of Appeal in *Rauca*, is the court's attempt to examine the place of *Charter* rights, to consider the interests that *Charter* rights represent and the impact on *Charter* rights of competing interests. The focus of the Court of Appeal is on the nature of basic democratic rights.

In the reasons for judgment of the Supreme Court of Canada in the *Skapinker* case and of the Federal Court of Appeal in the *Demaere* case, the focus is narrower, and the conclusions of the two courts are seriously disappointing.

In *Law Society of Upper Canada v. Skapinker*, the Supreme Court of Canada considered the impact of section 6 on the requirement that admission to the Bar of the Province of Ontario is restricted to Canadian citizens. The requirement is found in subsection 28(c) of the *Law Society Act*.<sup>216</sup> Skapinker, a citizen of South Africa at the time of the original application to the courts, had satisfied all the criteria for admission to the bar, except citizenship, to which he was not yet entitled. Stated narrowly, Skapinker argued that paragraph 6(2)(b) of the *Canadian Charter of Rights and Freedoms* granted him an independent right to pursue the gaining of a livelihood. He alleged that the requirement of citizenship imposed by the *Law Society Act* was a direct impediment to his right to pursue the gaining of a livelihood in any province. The Ontario Court of Appeal agreed with Mr. Skapinker. Grange, J.A. was of the view that subsection 6(2) of the *Charter* granted a constitutional right to pursue the gaining of a livelihood in any province, independent of any obligation to claim that right, only upon movement to a new location. The Supreme Court of Canada disagreed.

Does section 6 grant an independent right to gain a living without requiring accompanying movement? Mr. Justice Estey, on behalf of the Supreme Court of Canada, held that the answer is a categorical no. In the view of the Supreme Court, paragraph 6(2)(b) cannot be construed as an independent right to work. Estey, J. argued that the text of section 6 is ambiguous, and therefore reference must be made to the section heading "Mobility Rights" to determine its meaning and scope. This allowed the



Supreme Court to conclude that the right to pursue the gaining of a livelihood in any province is a right that can be exercised only when one is mobile, as the title of section 6 suggests. As Mr. Skapinker was not purporting to move to Ontario, paragraph 6(2)(b) afforded him no protection.

Bold consideration of the scope of constitutionally protected rights for all Canadians was desirable; instead, a narrow examination of tenuous principles of statutory construction obtained. We agree with Mr. Justice Estey that:

The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves.

The disappointment comes in discovering that Mr. Justice Estey, speaking for the Supreme Court of Canada, has failed to heed his own good counsel. At the technical level, it is worth noting that, although he pays lip service to the fact that the *Charter* is a constitutional document, subject to the interpretation acts of neither the provinces nor the federal government, the cases he refers to in support of doctrines of construction with regard to statutory headings are not of a constitutional nature. The attention of the court, and of those Canadians interested in the protection of human rights, is directed to such pithy statements as that quoted from Lord Hodson to the effect that:

The construction of the relevant section ought not to be governed ultimately by considerations of cross-headings, even though some attention may be paid to them.

This, when the issue at hand is constitutional rights!

Estey, J. cites a U.S. judgment and Driedger, *On the Construction of Statutes*, to the effect that:

If, however, the object of the statute cannot be clearly deduced from its terms, then this “minor evidence” (section headings) becomes more important and may provide sufficient evidence to tip the balance. It is submitted here that it is not correct to say that non-literary context may be considered only if there is doubt about the meaning of the words; it is more realistic to say that if the enacting words do not clearly show the object of the statute then it is permissible to look at the non-literary context in order to find the object.

In Estey, J.’s view, paragraphs 6(2)(a) and (b) create independent rights; the right enshrined in paragraph (b) does not create a right to work independent of mobility. The text is ambiguous, and the heading cannot be ignored. Paragraph 6(2)(b) requires “mobility” to be operative.

In our view, this narrow technical interpretation is unfortunate in the extreme. Mr. Justice Estey’s reading of the scope of the section is neither obvious nor the only interpretation that the court might have chosen.

First, Mr. Justice Estey admits that the section must be seen as ambiguous before references should be made to the heading “Mobility Rights.” Second, he admits that one cannot place great credence in the impact of headings under the *Charter*, at least not in every situation; using as an example the heading of “Legal Rights” to sections 7 through 14 of the *Charter*. Third, Mr. Justice Estey fails to turn his attention to subsection 6(1) which grants all citizens the right to remain in Canada; the right to remain makes no reference to mobility. Lastly, Mr. Justice Estey seems to be of the view that if paragraph 6(2)(b) were to be construed as recognizing a “right to work,” it would “simply proclaim the historic and the obvious in the case of a Canadian citizen . . . .” It is not entirely clear to what Mr. Justice Estey is referring. However, it is difficult to read the pre-*Charter* case law, with the exception of the *Winner* case, as recognizing that Canadian citizens have a right to work. Mr. Justice Estey also argues that such an interpretation of paragraph 6(2)(b) would have a negative impact on the right of any individual to commute across a provincial boundary to engage in regular work. We find it difficult to be entirely sure to what Mr. Justice Estey is referring here. Does he mean to imply that commuting across provincial borders is protected only to the extent it implies mobility in the sense of movement, which requirement he has imposed on subsection 6(2) rights? If so, this seems inaccurate. The combination of paragraph 6(2)(a) rights and paragraph 6(2)(b) rights would have given a right to work and a right to reside in any province. This would have been sufficient to protect the cross-boundary commuter.

In our view, the fundamental difficulty with the reasons for judgment of the Supreme Court of Canada in the *Skapinker* case, is that Mr. Justice Estey uses technical rules of interpretation to arrive at the content of a new constitutional right. In doing so, and in relying on the section heading, he fails to make the broadest possible use of the concept of mobility rights. There is no examination of historical or other precedents to determine the full scope of the meaning of mobility rights. Whatever those rights may be, in our view they should be given the broadest possible interpretation in a federal system. We are not concerned in Canada with the rights of members of foreign nations to reside in and to work in countries other than their own. We are concerned with the rights of Canadians to reside in and to work in provinces in a country of which they are citizens or permanent residents.

This narrow interpretation of paragraph 6(2)(b) allowed the Supreme Court of Canada to avoid consideration of the impact of subsection 6(3) on mobility rights. The Court of Appeal in *Skapinker* held that the *Law Society Act* was not a law of general application, such that Skapinker’s right to gain a livelihood in the province could not be made subject to it under the specific limitation of subsection 6(3). The Supreme Court of Canada did not have to deal with this particular limitation. However,



subsection 6(3) provides difficulties of its own with regard to constitutional protection for mobility rights in Canada.

The difficulties raised by subsection 6(3) were considered by the Ontario Court of Appeal in the *Skapinker* case and by the Federal Court of Appeal in the *Demaere* case. Although there is no definitive judgment on the scope of the subsection 6(3) limitation, the indications from the Federal Court of Appeal are discouraging. The dissent in *Skapinker* in the Ontario Court of Appeal argued that the *Law Society Act* was protected by the subsection 6(3) limitation. Whatever the scope of mobility rights, they may be derogated from by any law of general application, as long as that law of general application does not provide for discriminatory treatment on the basis of residence. Canadian courts considering the impact of subsection 6(3) have invariably referred to the reasons for judgment of Mr. Justice Dickson, now Chief Justice of the Supreme Court, in *Kruger and Manuel v. The Queen*.<sup>217</sup> Mr. Justice Dickson referred to two indicia to determine that legislation is of “general application.” These can be stated as follows:

- It is necessary to look first to the territorial reach of the act. If the act does not extend uniformly throughout the territory, the inquiry is at an end and the question is answered in the negative. If the law does extend uniformly throughout the jurisdiction the intention and the effects of the enactment need to be considered.
- The law must not be in relation to one class of citizens in object and purpose. But the fact that the law may have greater consequence to one person than to another does not, on that count alone, make the law other than one of general application.

Mr. Justice Grange, speaking for the majority of the Ontario Court of Appeal, held that the *Law Society Act* failed the second test. The *Law Society Act*, by its effect, impaired the status or capacity of a particular group. Mr. Justice Arnup, in dissent, held the contrary. The difference between the majority and dissent positions is in determining the question of the identification of the class to which the law applies. Mr. Justice Grange took the view that the group or class to which the law applied constituted only those who had the status of permanent residents of Canada. Mr. Justice Arnup took the view that the law applied to all those who *would be* members of the bar. The only limitation on discrimination was that of discrimination on the basis of residence.

A similar conclusion was reached by Mr. Justice Hugessen in the *Demaere* case. There, the *Public Service Employment Act* was held to be a law of general application and one which failed to discriminate on the basis of province of present or previous residence while it did discriminate on the basis of zone of present employment. Such discrimination was allowable.

In *Basile v. A.G.N.S.*,<sup>218</sup> Jones, J.A. struck down regulation 7 of the *Direct Sellers Licensing and Regulation Act*,<sup>219</sup> which regulation prohibited non-residents from being licensed as itinerant vendors. Applicant was a resident of Quebec employed as a direct seller in Nova Scotia. Regulation 7 provided that “no person shall be licensed as a salesman unless he is a permanent resident of Nova Scotia.” Mr. Justice Jones found that regulation 7 contravened subsection 6(2). Neither section 1 of the *Charter* nor paragraph 6(3)(a) applied, so as to save the provincial legislation. Regulation 7 was not a law of general application. It was directed at one specific group, namely, non-residents.

In *Malartic Hygrade Gold Mines (Quebec) Limited v. R.*,<sup>220</sup> Mr. Justice Deschenes held that the *Loi sur le Barreau* of the Province of Quebec is a law of general application. The provision of that statute required that a permanent member of a bar of another province was entitled to an occasional call, as long as there was an arrangement of provincial reciprocity, the payment of appropriate fees and a matter of federal competence. In the view of Mr. Justice Deschenes these could not be described as provisions that distinguish between persons based principally on province of previous or actual residence. The specific issue in the *Malartic* case was with regard to the issue of a matter of federal competence. The matter in which Mr. Neilson, counsel for Malartic and a member of the bar of Ontario, had requested an occasional call, was a matter of private civil law. Thus, Mr. Justice Deschenes had no reason to focus on either the requirement of provincial reciprocity or the requirement and level of fees for the occasional call. It is less clear that the requirement of reciprocity or of fees does not constitute colourable exclusions, based on residency.

In *Black v. Law Society of Alberta*, rules enacted by the Law Society prohibiting partnership with members of that society not ordinarily resident within the province were attacked as infringing section 6 *Charter* protections. Mr. Justice Dea, of the Alberta Queen’s Bench, concluded that the law society rules did infringe plaintiff’s paragraph 6(2)(b) right to pursue the gaining of a livelihood. He further held that the law society rules are “laws . . . of general application in force in a province” as described by subsection 6(3), but were not protected thereby as they did discriminate on the basis of province of residence. Paragraph 6(2)(b) was, therefore, violated. Dea, J. failed to take into account the determination of the Supreme Court of Canada in *Skapinker* that a violation of paragraph 6(2)(b) can occur only where the plaintiff exercises his right to work in conjunction with “movement” to the province. He held that the requirement that law partnership be arranged only between residents of the province of Alberta was a “reasonable limit prescribed by law” within section 1 of the *Charter*.<sup>221</sup>

Further difficulties with subsection 6(3) are identified in the reasons for judgment of the Federal Court of Appeal in the *Demaere* case. In that



case, Mr. Justice Hugessen considered paragraph 13(a) of the *Public Service Employment Act*.<sup>222</sup> The applicant alleged he had been disentitled from applying in a closed competition for a position as air traffic controller in Vancouver, British Columbia, being stationed, at the time, in Fort St. John in northwestern British Columbia. Fort St. John is in the northwestern region of the Canadian air traffic administration. Vancouver is in the Pacific region. Mr. Demaere attacked the determination that the competition was closed to those who were not employees of the Pacific region, under section 6 of the *Canadian Charter of Rights and Freedoms*.

*Demaere* predates the Supreme Court of Canada decision in *Skapinker*. Thus, the determination by the Federal Court of Appeal that paragraph 6(2)(b) does provide for the right to move to, reside and pursue work in any part of the country, has been overruled by the *Skapinker* decision. Mr. Justice Hugessen took a midpoint position on the meaning of the right to pursue the gaining of a livelihood. He held that, while it is linked to a concept of movement, it is not restricted to interprovincial movement. What is of concern here is the interpretation that Mr. Justice Hugessen brings to bear on subsection 6(3). Applying *Kruger and Manuel v. The Queen*, Mr. Justice Hugessen concluded that the *Public Service Employment Act* is a law of general application in force in a province. Subsection 6(3) includes federal laws applicable in some or all of the provinces. However, the subsection 6(3) limitation invalidates laws of general application only where those laws discriminate on the basis of province of residence. Here, discrimination was based, not on province of residence, but on employment in a region, as defined by legislation. Thus, Demaere could be prohibited from applying for the position in the Pacific region of British Columbia as he was at the time employed in the northwestern region.

The Supreme Court of Canada in *Skapinker* suggests, although it does not specifically state, that section 6 mobility rights will be granted only to those who move interprovincially. Those who cross provincial borders to work in another province are protected by paragraph 6(2)(b) regardless of their failure to take up residence in that province; a right protected by paragraph 6(2)(a). The Supreme Court of Canada suggests that the function of paragraph 6(2)(b) is to protect interprovincial commuters. It seems unlikely therefore that the Supreme Court of Canada would be prepared to extend mobility rights to intraprovincial movement.

Section 6 mobility rights protection is exceedingly narrow. Section 6 protects the right of citizens to enter, leave and remain in Canada. It protects the rights of citizens and permanent residents to move to a province and take up residence there and to work in another province, whether resident or not, so long as the individual must move to the point of employment. Even assuming legislation derogates from section 6 rights, it may nonetheless be valid on one of several grounds. It may be

valid under section 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable infringement of mobility rights. It may be valid under subsection 6(3) as long as it is of general application and, if of general application, does not discriminate on the basis of province of present or previous residence.

Thus, the concept of “law of general application” becomes key to the exercise of mobility rights as defined in section 6. A law that is not “of general application” cannot effectively derogate from mobility rights. Any law, even if of general application, that discriminates on the basis of residency will be ineffective to interfere with section 6 mobility rights. Laws of general application that discriminate on grounds other than residency will be valid under subsection 6(3), although reviewable under other sections of the *Charter*.

Finally, in *Re Allman et al. and Commissioner of Northwest Territories*<sup>223</sup> the Northwest Territories Court of Appeal upheld the Plebiscite Ordinance which required three years’ residence in the territories for entitlement to vote. The court dismissed the applicant’s argument that the ordinance violated subsection 6(2) and paragraph 6(3)(a) as “sophistry.” Mr. Justice Belzil adopted the language of the trial judge<sup>224</sup> that:

The fact is . . . that each of [the applicants] *has* moved to and *has* taken up residence in the Northwest Territories, and *has* been pursuing his or her livelihood within the Northwest Territories notwithstanding any disadvantage which he or she may suffer under the Plebiscite Ordinance. (Emphasis added.)<sup>225</sup>

Leave to appeal to the Supreme Court of Canada was refused.<sup>226</sup>

Should the view of the courts of the Northwest Territories be allowed to stand, it is difficult to see when Canadian courts will allow the constitutional content of section 6 to prevail. The Northwest Territories ordinance clearly discriminates on the basis of province of previous residence. The reasons for judgment suggest that the applicant must prove his movement was in fact impeded. Should he choose to move nonetheless, should he switch professions faced with an impediment to earning a living in his new province of residence, his claim to violation of his constitutional rights may be described as “sophistry.” This is completely inappropriate to the constitutional context. It smacks of concepts of damages for invasion of private rights. Will we require mitigation of damage of those who allege violation of their constitutional rights? It ignores the concept of standing in law. The U.S. approach, requiring proof of potential impediment only is clearly preferable. Is there any constitutional content left to section 6?

Subsection 6(4) provides an additional exception to the impact of section 6 mobility rights. That subsection excludes from the subsections 6(2) and (3) provisions “any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that prov-



ince who are socially or economically disadvantaged if the rate of unemployment in that province is below the rate of employment in Canada.” As Laskin points out, the great majority of the provinces are likely to fall within the purview of subsection 6(4). Thus subsections 6(2) and (3) mobility rights are made ineffectual by the impact of subsection 6(4).

Subsection 6(4) has yet to be dealt with by Canadian courts. There are certain problems of drafting. First, subsection 6(4) presumably applies only where the law, program or activity has as its “object” the amelioration of certain conditions in the case of individuals. It is hard to see that legislation providing for leases, contracts or other provisions with regard to a project in the province, which legislation contains an affirmative hiring provision, has as its legislative “object” an affirmative action component. Its legislative object seems rather to be the construction or other project contemplated. Therefore, it is possible that our courts will give narrow scope to the subsection 6(4) exception. This is to be hoped for. Furthermore, the subsection refers to affirmative action programs designed to improve the condition of socially or economically disadvantaged individuals. Where the affirmative action program is designed so as to give advantageous treatment to all residents of a province, such a program would presumably not meet the requirements of subsection 6(4) and would, therefore, be subject to the basic provisions of subsections 6(2) and (3). While subsection 6(4) is potentially broad enough to empty section 6 mobility rights of content, there is scope for Canadian courts, focussing on the issues mentioned, to insist that the subsection 6(4) exception be given narrow play. Section 6 mobility rights are, in our view, inappropriately narrow as constitutional safeguards. One can only hope that the very narrow protection they afford will not be further limited by an unduly broad reading of subsection 6(4).

## Conclusion

Personal mobility is of fundamental importance to Canadians. Economic theory posits that personal mobility is an economic good. Within limits, mobility of labour and services enhances the efficient functioning of the Canadian economic union. Personal mobility is also a fundamental political right, recognized broadly in the constitutional documents of the Western world, enshrined in the Canadian Constitution, and held dear by all Canadians as their individual personal right. In Canada, conflicting forces, in particular those we have identified as the impetus to nation building and the impetus to province building, impact on and derogate from, full recognition of mobility rights for all Canadians.

Canadians share a common nationality and common goals. Canada is a federation of provinces, not an organization of independent sovereign

states. In this, Canada differs from the political and economic association represented by the European Economic Community.

There are fundamental economic and cultural differences between Canada's various regions. Reconciliation of these differences is recognized by Canadians as a necessary component of social, political and legal policy. Minimization of economic and regional disparities is enshrined in section 36 of the *Canadian Charter of Rights and Freedoms*, which provides:

36(1) Without altering the legislative authority of Parliament or of the provincial legislator or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and Provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
- (b) furthering economic development to reduce disparities and opportunities; and
- (c) providing essential public services of reasonable quality to all Canadians.

(2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of taxation.

The right to personal mobility is a value recognized and shared by all Canadians. For this reason, it is our view that those who would impose impediments to personal mobility for Canadians bear a heavy burden of justification of those impediments. In the absence of rigorous justification, the fundamental right to personal mobility should take precedence.

Prior to the constitutional amendments in 1982, the mobility rights of Canadians received little legal protection. Section 6 of the *Canadian Charter of Rights and Freedoms* entrenches constitutional recognition of mobility rights. Unfortunately, the protection afforded by section 6, particularly in light of its interpretation by the Supreme Court of Canada in the *Skapinker* case, fails to provide sufficient recognition and protection for personal mobility. That section fails to constitutionalize an independent right to earn a living in any province of Canada, in the absence of movement to a new province for that purpose. Furthermore, section 6 provides explicit recognition of the right of the provinces to discriminate on grounds other than residence. (It is understood that section 15 provides limits to the right to discriminate on other grounds.) Section 6 protects against discrimination based on province of residence only. It legitimizes "reasonable residency requirements for entitlement to social services." It leaves untouched impediments to the mobility of those living and working in one part of a province who find themselves barred from work in another part of the province.

Section 6, as interpreted by the Supreme Court of Canada, places undue importance on the concept of "laws of general application." In



our view, constitutional rights should not turn on a concept with which the courts have already evidenced disagreement and difficulty on matters of fact. Finally, subsection 6(4) excludes from the purview of section 6 all provinces wherein the rate of employment is below that of the rate of employment in the nation as a whole. The province must establish that the legislation, program or activity has as its object the amelioration of the conditions of individuals who are socially or economically disadvantaged. The protection afforded mobility rights by section 6 is wholly inadequate. It is a poor political compromise.

While section 6 may be disappointing, there is no reason why interprovincial and federal-provincial cooperation cannot broaden the protection afforded to the mobility rights of Canadians. In our view, mechanisms for coordination, exchange of information and cooperation to enhance mobility rights is not only possible but imperative. We conclude that there is a crying need for empirical studies of the effects of impediments on the lives of individuals, whether at the federal or the provincial level, and a need for quantification of the economic costs and benefits of impediments to mobility. Few such empirical studies are available. Those studies we do have estimate that the actual economic loss occasioned by existing impediments may be significant and may far outweigh actual and perceived economic and political benefits. Muzondo and Pazderka estimate that impediments to mobility of professionals cost Canadian consumers \$50 million in 1970. Impediments to mobility of students imposed by the provinces in the field of education are ineffective. Finally, where affirmative hiring policies are based on residency requirements which are lengthy, one questions whether this diminishment of the pool of residents benefiting from affirmative action policies can be of any real economic significance. In the absence of hard economic data suggesting that impediments to mobility benefit the protected group, impediments should not be allowed to stand.

Even should impediments to mobility of persons provide an apparent economic benefit to the protected group, economic theory suggests that such impediments are ineffective due to leakage and spillover. Such policies are particularly vulnerable to retaliation.

True mobility of Canadians requires that all Canadians, wherever resident, have access to necessary information upon which to base decisions with regard to mobility; that levels of social services be essentially equivalent; and that Canada's two language groups have access to services in their own language, regardless of region or province. Finally, Canadians who move to take up residence in a new part of the country must be able to carry with them accrued benefits.

Many of the identified impediments to personal mobility make little sense. Some appear to be ineffective, such as provincial attempts to interfere with the mobility of students receiving provincial funding. Some seem unnecessarily cruel, such as the Ontario residency require-

ments with regard to income or health insurance premium assistance. Many are simply irrational or unjustifiable. Residency and language requirements as identified herein fall into this category. Finally, in many cases, a little provincial cooperation would minimize some of the unnecessary impediments to mobility of persons. Provincial cooperation in the drafting and translating of the various necessary forms, oaths of office, and such, would, it is suggested, be perceived as an important gesture of goodwill by language minorities in the various provinces and regions.

Permissible impediments to mobility do undoubtedly exist. The Quebec program for a more rational distribution of medical personnel in the province through the use of differential fee structures falls into this category. Even here, national planning and provincial cooperation would be a preferable solution to the rationalization of medical manpower resources in Canada.

The EEC and constitutional developments in the United States offer important models for Canadian consideration. The principles recognized by the EEC and the U.S. Supreme Court share common objectives. Each requires rational objective justification of impediments to mobility. The principle of policies of harmonization required in the EEC is a principle that could well be adopted by the Canadian provinces and federal government, and its requirements for the development of mechanisms for coordination, exchange and cooperation should become underlying principles for Canadian government entities as well.

More precise lessons result from our study of U.S. constitutional law. While these are legal principles and should be considered by Canadian courts in their analysis of section 6 mobility rights, particularly under subsection 6(4), they may also serve as fundamental guidelines in inter-governmental dialogue and negotiation. We would particularly recommend to both Canadian courts and governments that before impediments are implemented, the implementing government be obliged to provide rigorous proof that the disadvantaged group, whether non-residents or residents of specific regions within a province, constitutes an evil. The discriminatory impediments must be shown to bear a close relation to the evil that the legislation or practice purports to address. Where the legislation or practice is justifiable, the government in question must show that it has drawn its solution to the problem as narrowly as possible. These principles should be tempered by recognition that the government proposing the impediment is best placed to analyze the problem and to prescribe a cure, providing the above requirements have been met. Finally, in our view, discriminatory treatment against some residents of a province or a region should be subject to the same overriding principles. However, it should be borne in mind that provincial residents have one remedy not available to non-residents of that jurisdiction; that is, the remedy of the ballot box. Thus, discriminatory treatment of non-residents, unable to exercise their democratic fran-



chise, is that much more suspect and should be subject to exceedingly vigorous analysis.

The personal mobility rights of Canadians are fundamental to Canada as a nation. In the absence of rigorous justification all governments should strive to eliminate existing impediments and avoid the imposition of future impediments. Impediments to the mobility of others is politically seductive. This seductiveness should be avoided in the interest of promoting Canadian unity.

## Notes

This study was completed in February 1985.

1. Now the *Constitution Act, 1867*, R.S.C. 1970, Appendix at p. 121.
2. A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974).
3. *Ibid.*, at p. 2.
4. B. Balassa, "Types of Economic Integration," in S. Machlup, *Economic Integration* (London: Macmillan, 1976). at p. 17.
5. *Supra*, note 2, at p. 76.
6. *Constitution Act, 1981*, S.C. 1982, proclaimed in force April 17, 1982.
7. J. Maxwell and C. Pestieau, *Economic Realities of Contemporary Confederation* (Montreal: C.D. Howe Research Institute, 1980).
8. *Ibid.*, at p. 14.
9. *Supra*, note 2, at pp. 4, 76, 100. See also Consultative Task Force on Industrial and Regional Benefits from Major Canadian Projects, Manpower Subcommittee, "Report of the Manpower Subcommittee" (unpublished Working Paper, October 17, 1980). The task force concluded that there were concurrent shortages and surpluses in many occupational skills in different regions of Canada.
10. *Supra*, note 2, at p. 77. See also P.W. Hogg, "Freedom of Movement of Goods, Persons, Services and Capital: Canadian Case Law" (1979-80), 3 *Journal of European Integration* 301: "Some regions are favoured by mobility; others are disfavoured. Provincial governments in poorer regions of the country have little or no incentive to permit, let alone encourage, the loss of wealth and people which would be the effect of free movement."
11. *Supra*, note 7, at p. 15.
12. *Supra*, note 2, at p. 101. F.R. Flatters and R.G. Lipsey, *Common Ground for the Canadian Common Market* (Montreal: Institute for Research on Public Policy, 1983).
13. [1951] S.C.R. 887 at 918.
14. 21 U.N.G.A.O.R. Supp. 16, U.N. Doc. A/6316 at 52 (1966), (1976) Can. T.S. No. 47 (in force for Canada August 19, 1976). Article 12 provides:
  1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose residence.
  2. Everyone shall be free to leave any country including his own.
  3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre publique*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present covenant.
  4. No one shall be arbitrarily deprived of the right to enter his own country.
15. Treaty Establishing the European Economic Community. Signed March 25, 1957, Rome, Italy.
16. *Ibid.*, arts. 48-66.

17. *Ibid.*, art. 3(c), Part I. Principles.
18. Articles of Confederation, Art. 4: "... The free inhabitants of each of these states ... shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively."
19. Art. 4, s. 2, cl. 2 provides: "The citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states." Art. 2, s. 8, cl. 3 provides that the federal government has the power to "regulate commerce ... among the several states."
20. "Whither the Canadian Common Market," reprinted in C. Barrett, *Key Economic and Social Issues in the Early 1980s*, Canadian Study No. 62 (Ottawa: Conference Board of Canada, 1980).
21. *Supra*, note 7, at p. 31.
22. The most recent example of this kind of provincial dispute is in the context of the new *Canada Health Act*. In particular, two provisions of that Act were distressing to the provinces. The first of these was the penalty attached to the receipt of funds by any province that allows for extra billing. The second was the requirement, added late to the Act, that binding arbitration must be made available to doctors' organizations in determining provincial fee scales. As health is clearly an area of provincial jurisdiction under the *Constitution Act, 1867*, this is clear interference (by way of transfer payments) with provincial autonomy to design a health care system. One suspects that the provincial objections are based more on objections to federal interference than on objections to the health care system as designed by Ottawa.
23. T. Courchene, "Regional Adjustment, the Transfer System and Canadian Federalism," in *Proceedings of the Standing Senate Committee on Finance*, 4th sess., 30th Parl., Nov. 23, 1978, at p. 5A:10. Prince Edward Island, Nova Scotia and New Brunswick each have a minimum wage very close to that of Ontario. This has inhibited the inflow of capital necessary to those provinces to activate an economic adjustment process. Quebec's minimum wage is even higher than that of Ontario. This impacts significantly on the level of unemployment in these provinces. However, provincial governments are insulated from the effects of these economic policies by the federal contribution to unemployment insurance and by other federal transfer payments. See *supra*, note 7, at p. 69.  

In summary, the main effect of regional policy in the past has been to patch over the problem of regional disparities by using government revenues to increase current income rather than to promote sustained economic growth and development.
24. *Supra*, note 7, at p. 65.
25. Flatters and Lipsey, *supra*, note 12, at pp. 24–30.
26. The *Internal Migration and Immigrant Settlement* study (1975) of the Department of Manpower and Immigration reports that, while there is some tendency for net interprovincial migration to occur from provinces with unemployment rates higher than the national average (Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island and Quebec) to provinces with lower than average unemployment rates (Ontario and Alberta), this is not the only pattern. Manitoba and Saskatchewan have low overall unemployment and experience net out-migration. British Columbia has higher than average unemployment and yet has heavy net in-migration. See also M.J. Greenwood, "Research on Internal Migration in the United States: A Survey" (1975), *Journal of Economic Literature* 37. Further, while in theory out-migration should be an efficient reduction of the level of unemployment in a province and result in fuller utilization of remaining resources, out-migration may nonetheless have a negative impact on the level of employment in the previous provinces of residence. See J. Vanderkamp, "The Effect of Out-Migration of Regional Employment" (1970), *Canadian Journal of Economics* 54; concluding that for every five unemployed persons in the Atlantic Provinces who left the region, two additional individuals



- became unemployed. See also S.L. Winer and D. Gauthier, *Internal Migration and Fiscal Structure*, a study prepared for the Economic Council of Canada (Ottawa: Minister of Supply and Services Canada, 1982).
27. *Internal Migration and Immigrant Settlement*, *supra*, note 26, at p. 39.
  28. T. Courchene, "Interprovincial Migration and Economic Adjustment" (1970), *Canadian Journal of Economics* 550 at p. 576; *Internal Migration and Immigrant Settlement*, *supra*, note 26, at p. 6.
  29. *Internal Migration and Immigrant Settlement*, *supra*, note 26, at p. 12.
  30. *Ibid.*, at p. 13.
  31. *Ibid.*, at p. 14.
  32. *Ibid.*, at p. 17. See, generally, E. Kenneth Grant and John Vanderkamp, *The Economic Causes and Effects of Migration: Canada 1965-71* (Ottawa: Economic Council of Canada, 1976); Stanley L. Winer and Denis Gauthier, *Internal Migration and Fiscal Structure: An Economic Study of the Determinants of Interprovincial Migration in Canada* (Ottawa: Economic Council of Canada, 1982).
  33. Grant and Vanderkamp, *supra*, note 32, at p. 16. See also John Vanderkamp, *Mobility Behaviour in the Canadian Labour Force*, Special Study No. 16, prepared for the Economic Council of Canada (Ottawa: Minister of Supply and Services Canada, 1973).
  34. Rejean Lachapelle and Jacques Henripin, *The Demolinguistic Situation in Canada* (Montreal: Institute for Research on Public Policy, 1982), at pp. 197-98.
  35. Mireille Baillargeon, *Évolution et caractéristiques linguistiques des échanges migratoires interprovinciaux du Québec depuis 1971* (Quebec: Conseil de la Langue Française, 1983), at p. 17.
  36. *Ibid.*, at p. 17.
  37. S.C. 1983-1984, c. 6.
  38. R.S.C. 1970, c. H-8.
  39. R.S.C. 1970, c. M-8.
  40. *Canada Health Act*, *supra*, note 37, subsec. 11(1).
  41. *Ibid.*, section 2.
  42. *Ibid.*, paragraph 11(1)(c).
  43. M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene, J. Whalley, *Federalism and the Canadian Economic Union* (Toronto: Ontario Economic Council, 1983), Table 6, at p. 292.
  44. *Ibid.*
  45. R.S.C. 1970, c. C-1.
  46. Para. 6(2)(d).
  47. M.J. Trebilcock, G. Kaiser and J.R.S. Prichard, "Interprovincial Restrictions on the Mobility of Resources: Goods, Capital and Labour," in Ontario Economic Council, *Intergovernmental Relations: Issues and Alternatives, 1977* (Toronto: The Council, 1977), at p. 113.
  48. R.S.O. 1980, c. 352.
  49. *Ibid.*, cl. 1(c), subsec. 2(1).
  50. R.S.O. 1980, c. 336.
  51. *Ibid.*, cl. 1(h).
  52. *Supra*, note 47, at p. 114.
  53. *Pension Benefits Act*, R.S.A. 1980, c. P-3, s. 12; *Pension Benefits Act*, S.N.S. 1975 c. 14, s. 17; *Pension Benefits Act*, R.S.O. 1980, c. 373, s. 20; *Supplemental Pensions Plans Act*, R.S.Q., c. R-17, s. 31.
  54. *Pension Benefits Act*, R.S.S. 1978, c. P-6, s. 16.
  55. *Pension Benefits Act*, S.M. 1975, c. 38, s. 21.
  56. Statistics Canada, *Pension Plans in Canada, 1982* (Minister of Supply and Services Canada, 1984), Table XX, at p. 50.

57. Ibid.
58. *Report of the Parliamentary Task Force on Pension Reform* (Ottawa: Queen's Printer, 1983).
59. Ibid., Recommendation 6.1, at p. 51.
60. The Canadian Association of Pension Supervisory Authorities (CAPSA) was established by the provinces to promote uniformity and to ease the administration of the acts.
61. (Ottawa: Secretary of State, 1980).
62. As reported in *The Globe and Mail*, March 24, 1984.
63. Association of American Medical Colleges, *Medical School Admissions Requirements, U.S. and Canada, 1979-80*, 25th edition, cited in Trebilcock et al., *supra*, note 43.
64. *Report of the Federal-Provincial Task Force on Student Assistance* (Ottawa: Secretary of State, 1980), at p. 18.
65. Ibid., at p. 146.
66. Ibid., at p. 178.
67. J.W. Grove, *Organized Medicine in Ontario: A Study for the Commission on the Healing Arts* (Toronto: Queen's Printer, Ontario, 1969).
68. *Supra*, note 43, at pp. 280-81.
69. "Impediments to the Interprovincial Mobility of Labour of Canada," paper delivered at the Fourth Annual Meeting of the Association of Quebec Economists, Montreal, April 26, 1979, at p. 5.
70. *Supra*, note 47; *supra*, note 43, at p. 279.
71. (Ottawa: Minister of Supply and Services Canada, 1980).
72. R.S.C. 1970, c. P-32, s. 19.
73. R.S.C. 1970, c. R-3, regulations thereunder, s. 16.
74. S.C. 1977-78, c. 20.
75. J. Chrétien, *Securing the Canadian Economic Union in the Constitution*, (Ottawa: Minister of Supply and Services Canada, 1980), at pp. 41-42.
76. Ibid.
77. Regulation 139-78, subsec. 124(1).
78. *An Act Respecting Petroleum Resources*, S.N.S. 1980, c. 10.
79. Policy Statement by the Government of Alberta cited by Trebilcock et al., *supra*, note 43, at p. 272.
80. *An Act Respecting Labour Relations in the Construction Industry*, R.S.Q. c. R-20, O.C. 1946-82, August 25, 1982.
81. Ontario Ministry of Industry and Tourism, *Interprovincial Economic Cooperation*, at p. 8, cited by Trebilcock et al., *supra*, note 43, at p. 273.
82. *Office de la Construction du Québec v. Larochelle*, Quebec C.A., June 1, 1984 (unreported).
83. *Citizenship and Professional Practice in Ontario, Working Papers Nos. 3 and 12* (Toronto, 1978).
84. *Professional Licensing and Competition Policy: Effects of Licensing on Earnings and Rate of Return Differentials*, Bureau of Competition Policy Research Branch, Research Monograph No. 5 (Ottawa: Minister of Supply and Services Canada, 1979).
85. *Health Insurance Act*, S.Q. 1982, c. A-29; Reg. 1291-82, June 2, 1982; Reg. 1293-82, June 2, 1982.
86. Ibid., s. 19.
87. *Medical Services Act*, 1st Sess., 33rd Leg. B.C., 32 Eliz. II, 1983, cl. 17, 20(2).
88. Ibid., subcl. 20(3).
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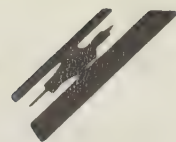
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